INDEX.

	PAGE.
Statement of the Case	1
Questions involved in the action	4-6
Manner in which the questions are raised	6
1. How 1st question arose	6-17
2. How 2nd question arose	17-21
3. How 3rd question arose	21
4. How 4th question arose	21-30
5. How 5th question arose	30-47
6. How 6th question arose	47
7. How 7th question arose	47
8. How 8th question arose	49
9. How 9th question arose	50-51
11. How 11th question arose	51
12. How 12th question arose	51
13. How 13th question arose	51-52
14. How 14th question arose	52-53
Assignment of errors specifying the particular errors upon which plaintiff in error relies.	54-56
1. Error in overruling demurrer	54
2. Error in denying motion to stay proceedings pending settlement of adverse claims to property	55
3. Error in sustaining verdict as to compensation given before conflicting interests to land had been determined	55
4. Error in the instructions as to compensation to be paid	56
5. Error in upholding validity of State statute concerning compensation for property condemned.	57
6. Error in instructions as to water rights of defendants	57-59
7. Error in instructions as to water courses and percolating waters.	59-64

PAGE.

8. Error in instructions as to defendants' pueblo rights — 64-65
9. Error in denying just compensation for percolating waters 65
10. Error in denying compensation as to riparian rights 65
11. Error in upholding validity of state statutes with respect to powers of juries in condemnation suits, etc. 65-66

Jurisdiction of the court to review the judgment of the state court 66-85

1. As to the time within which the writ was issued 66
2. Statement of the federal questions involved and raised 67-76
3. Showing that protection of the constitution was sufficiently invoked 77-84

Discussion of action of trial court in trying question of amount of compensation, and determining conflicting interests to the land in the same condemnation proceeding, and also taking the verdict of the jury as to the compensation before determining the interest of plaintiff in the property to be condemned 85-10

Discussion of constitutionality of state statue limiting inquiry as to value of property to be condemned to the date of the issuance of the summons 100-11

Discussion of the pueblo rights of defendants, and claim as their paramount rights 113 14

Further discussion of pueblo rights of defendants and plaintiff's contention that whatever those rights were, are limited to the pueblo limits and to the pueblo purposes 146-16

Discussion of rights of plaintiff to the percolating waters by virtue of patents from the United States Government 160-20

In the

Supreme Court of the United States

Docket No....., October Term, 1902. 149.

John D. Hooker and A. E. Pomeroy,
Plaintiffs in Error,

vs.

City of Los Angeles,
Defendant in Error.

BRIEF ON BEHALF of the PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

On the 22nd day of May, 1893, the City of Los Angeles brought a suit against A. E. Pomeroy and J. D. Hooker, the plaintiffs in error here, to condemn certain tracts of land which are described in the complaint. In the said complaint there are two separate descriptions, but these apparently different tracts are contiguous, and constitute in fact but one tract, containing a little over 314 acres.

The object of the condemnation suit was to construct a system of water works and to secure the lands necessary for pipes, flumes, conduits, and to construct necessary dams, tunnels and filtration

galleries, and to construct and operate a complete system of headworks, so-called, on the said lands. The original complaint will be found in transcript, pages 23-25, fols. 1-4. The summons was issued in this cause on the 27th day of June, 1893 (trans. fols. 5-7, pp. 25-26), and served on the 6th day of June, 1894 (trans. fol. 7, p. 27). This complaint was amended several times. The final amended complaint upon which the plaintiff went to the trial is set forth in the transcript, pages 32-37, folios 15-23.

The questions involved in this action are:

1. When a suit or proceeding is instituted to condemn private property for a public use, and to determine the compensation to be paid therefor, and the plaintiff in the condemnation suit sets up a claim to an interest in the property, and that claim is controverted and litigated in the same suit or proceeding, does such a proceeding deprive one of his property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States?

2. If, in such a proceeding (assuming that it can be sustained at all), the verdict of a jury is taken upon the amount of compensation to be paid, before it has been determined what is the property of the defendants that is to be taken, is not such action in violation of the said Fourteenth Amendment of the Constitution of the United States?

3. Did not the said proceedings of the court compelling the plaintiffs in error to litigate their title or right to a portion of the property, in the same proceeding, and at the same time that the question of the amount of compensation to be paid was being tried, deny to the plaintiffs in error the equal protection of the laws in violation of the provision of the Constitution contained in the Fourteenth Amendment prohibiting any state, from denying to any person within its jurisdiction the equal protection of the laws?

4. Is the provision of section 1249 of the Code of Civil Procedure of the State of California, which provides that "for the

purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actuallly taken, but injuriously affected in all cases where such damages are allowed as provided in section 1248," as interpreted by the Supreme Court of the State of California in this case, in violation of the said Fourteenth Amendment of the Constitution of the United States?

5. Has the City of Los Angeles any such prior and paramount right to the waters of the Los Angeles river, either surface or subterranean, as adjudged in this case?

6. If any such prior or paramount right exists, does that right extend to the uses of the waters of the Los Angeles river for maintaining public parks and fresh water lakes therein, or any other purpose than for irrigation and domestic use?

7. If such prior and paramount right exists, does it extend beyond the limits of the pueblo lands, and expand with the expansion of the territorial limits of the city of Los Angeles, and extend to whatever uses or pleasures modern civilization may devote such waters to?

8. Are the plaintiffs in error owners of the waters percolating in the soil of the land sought to be condemned in this cause, claiming title thereto, as they do under the said Mexican grants confirmed by the United States, and the patents issued by the latter government in pursuance of that confirmation?

9. If they own the said percolating waters as part and parcel of the thing granted by said grants of the Mexican government and patents of the United States, can they be deprived of it by judicial definitions of terms?

10. If their ownership is not to be defeated by the interpretation of words in instructions to juries, have not the plaintiffs in error been, by those instructions, deprived of their property with-

out due process of law, because that property has been taken for a public use, without just or any compensation?

11. Do not the acts of the Legislature of the State of California introduced in evidence in this case attempting to invest the City of Los Angeles with the prior and paramount right to the use of the waters of the Los Angeles river and to the waters percolating in the said land, impair the obligations of the contract contained in the Spanish and Mexican grants and United States patents under which the plaintiffs in error claim?

12. Do not the said acts of the Legislature of the State of California deprive the plaintiffs in error of their property without due process of law?

13. Are not the instructions of the court to the jury as to what constitutes percolating waters and what an underground water course, the principal of which said instructions will hereafter be set out, incorrect, and did they not practically withdraw from the consideration of the jury the compensation to be paid for the most valuable part of the property of the defendants sought to be condemned by far, and thereby take the defendant's property without due process of law, in violation of the said constitutional provision.

14. Are not the instructions of the court hereafter set out, by which the jury were directed that the compensation to be awarded by them for the property taken should be the market value of the property at the date of the issuance of the summons erroneous, and did they not result in taking the defendants' property without just compensation, in violation of the said provisions of the Constitution of the United States.

MANNER IN WHICH SAID QUESTIONS WERE RAISED.

First. In the third and last amended complaint, and upon which the trial was had, it was alleged, among other things, that the Los Angeles river was a non-navigable stream rising to the north of the City of Los Angeles, and flowing through the city, and was fed by springs which rise to the surface in, or adjoining, the bed of the

said river; that its bed from its source to the northern boundary of the city was composed of a sandy soil into which water sinks readily and forms subterranean streams flowing in well-defined channels beneath said bed, which subterranean water rises to the surface before reaching said city, and becomes a part of the surface water of said river (Trans. p. 63, fol. 64.)

It is alleged next, in the third paragraph of the complaint, that the plaintiff is, and ever since its organization had been, the owner in fee simple of the exclusive right to the use of all of the waters of said river, from its source to the southern boundary of the city, in trust, for public purposes, of supplying the inhabitants of the city with water for domestic uses, and of supplying water for irrigation of the irrigable lands embraced in the four leagues of pueblo lands, and for other municipal uses in said city (id p. 63, fols. 64-65.)

Then follows the allegation in regard to the plaintiff's proposed works for supplying the city and its inhabitants with water. And an allegation of the passage of the ordinance by the council of the city, directing proceedings to be taken for the condemnation of the property. The 6th paragraph is concerned mainly with showing the claimed necessity for the construction of these works, and for the condemnation of so large a tract of land for those purposes.

The 7th paragraph of the complaint contains a description of the property sought to be condemned.

(Trans. pp. 63-67, fols. 65-70.)

In the 8th and last paragraph, the plaintiff alleges that, subject to the said rights of the plaintiff to said waters of the Los Angeles river, the defendant Hooker was, at the time of and after the commencement of the action, the owner in fee simple of the tract first described, and the defendant Pomeroy was the owner in fee simple of the tract secondly described. That these tracts include only a part of an entire parcel which belonged at, and after the commencement of the action, to Hooker, and the second tract included a part

of an entire parcel which, at the commencement of the action, belonged to Pomeroy (Trans. p. 67, fols. 70-71.)

The prayer of the complaint is as follows: "Wherefore, plaintiff prays judgment against the defendants and each of them, for the condemnation in fee simple of all the *estate, right, title and interest* of said defendants and each of them, of and to each of said two tracts of land described in paragraph 7 of the complaint, and of the whole thereof, and that after the damages to the defendants and each of them by reason of the taking of said property shall have been estimated and ascertained, then said property be adjudged to vest in fee simple in the plaintiff, and for such further orders," etc. (Trans. p. 67, fols. 71-72.)

Let it be noted that in the original complaint the prayer was different. It was a prayer for judgment for the condemnation of each of the said tracts of land hereinbefore described for the purpose of maintaining and operating said headworks, etc. (Trans. pp. 24-25, fol. 4.) There was nothing said about limiting this condemnation to a fee simple of all the *estate, right, title and interest* of the defendants and each of them. Nor was there anything in the original complaint about this claimed right of the City of Los Angeles to the water of the Los Angeles river, either surface or subterranean, nor any allegation that the ownership of either Hooker or Pomeroy was subject to any rights of the City of Los Angeles whatever. (Trans. pp. 23-25, fols. 1-4.)

The defendants demurred to this third amended complaint upon the ground that it was insufficient to constitute a cause of action, and uncertain (1), as to the necessities required for the condemnation; (2), as to what were the works to be constructed; (3) as to what quantity of land was necessary to be taken; (4) as to the rights which the plaintiffs claimed in the waters of the Los Angeles river; (5) for what reason or purpose, or for the construction of what works the tracts of land were required; (6) uncertain as to whether any portion of the tracts was necessary for any purpose of the city; (7) uncertain that the said lands or any part of either tract was

necessary for any purpose of the city; (8) uncertain as to what estate the defendants were admitted to own in the land, and what estate was sought to be condemned; (9) uncertain as to what property the defendants owned, or what it was necessary to condemn; (10) uncertain as to what waters were claimed to constitute the Los Angeles river.

And the defendants demurred upon the further ground that several causes of action were improperly united in the third amended complaint in that a cause of action to determine rights in the waters of the Los Angeles river and the waters percolating beneath its bed claimed to be owned by the plaintiff, and which claim was controverted by the defendants, was improperly united with an action to condemn property for a public use, admitted to be owned by the defendants (Trans. pp. 68-69, fols. 73-74.) This demurrer was overruled on the 26th of March, 1896.

The defendants' answer will be found on pages 39 to 46, folios 26 to 37. This answer admitted that the defendants were the owners of the property, and also set forth that while the title to one tract appeared on the records in the name of one of the parties, and the other tract in the name of the other, that they were in fact owners as tenants in common of both tracts (Trans. pp. 39-40, par. 1 of the answer.) They denied that the Los Angeles river was fed by springs which rise to the surface in or adjoining the bed of the river, but aver that the stream had its source in the mountains north of the City of Los Angeles, and that the river was supplied by the sources of its main stream and its tributaries. They admitted that the bed of the river from its source to the northern boundary of the city was, for a considerable portion of that distance, composed of a sandy soil, but denied that the waters of the stream sink readily into the sands or formed well-defined subterranean streams, or flowed in well-defined or any channels beneath the bed, or that such subterranean water flowing in said channels rise at various or any place before reaching the city, or became part of the surface water of the river. They denied that the city

was, or ever had been, the owner in fee simple, or in any way, of the exclusive or any right to the use of all the waters of the river from its sources to the southern boundary of the city, in trust for public purpose of supplying the inhabitants of the city for domestic uses or supplying water for the irrigation of the irrigable lands embraced in the four square leages of the pueblo, or for other municipal uses in said city, or for any uses or purposes whatsoever. They denied that the city had any right in the water, or right to the use of the same other than such as pertained to the said city as a riparian owner of lands through which the river flowed, and rights acquired by appropriation and use thereof; and denied that such right or use by appropriation, or otherwise, had vested in the plaintiff, or that the plaintiffs had the right to the use of the waters of the Los Angeles river to the exclusion of the defendants. They averred that the lands owned by them were riparian to the stream, and far above the north boundary of the city and above the point of diversion of the waters of the said river by the said city, and that as such riparian owners they were entitled to the use of the waters of said river for all legal purposes, and to a resonable extent, for irrigation, domestic and other uses. (Trans. p. 40.) They denied, in the 5th paragraph, that the city had, prior to the commencement of the action, taken measures to inaugurate any plan or system of water works on the lands sought to be condemned, etc., and alleged that the lands sought to be condemned were of great value, to-wit, of the value of one million, five hundred thousand dollars, and that no proceedings had been taken by the City of Angeles for the purpose of raising money, either to construct the system, or to compensate the owners for the land, and that the City of Los Angeles could not, from any funds it then had in its hands, or from the current revenues of any years, make payment or compensation to the said defendants for the said lands sought to be condemned (Trans. p. 45, par. 5 of the answer.) They denied that the greater part of the water of the Los Angeles river flowing on the surface below and to the east of the lands of

the defendants, described in the complaint, comes into the river beneath the surface at points adjoining the northern line of said lands, or that the subterranean water flowing beneath the bed of said river was purer or more suitable for domestic use than the surface water, and denied that any of the surface water of the river below the lands of the defendants came into the river beneath the surface at the points mentioned (Trans. pp. 41-42, fol. 30, par. 7 of the answer.) They denied the necessity for the condemnation by denying the facts alleged to constitute the necessity, and averred that the condemnation of five acres of land would be sufficient for the construction of all necessary works for such purpose (Trans. p. 42, pars. 8-9, fols. 30-31.) Other denials and amissions followed substantially along the same lines in paragraphs 10 to 13, pages 42 to 44, and in the 15th paragraph, after averring that the lands owned by the defendants were of great value for agricultural purposes, to-wit, one hundred and fifty dollars an acre, they alleged that they had a special and peculiar value on account of the quantity of water percolating therein, and which might be developed thereon, and that by reason of the location of the land and its altitude, said waters were very valuable for supplying the city of Los Angeles and farming communities to the east and west of the city, and alleged that a large amount of this percolating water, to-wit, three thousand inches measured under a four-inch pressure, could be developed at a point from which they could be conducted to the elevated portions of the city of Los Angeles and all other parts of said city, and also to the farming lands east and west, and that the land had great value on account of the waters percolating therein, to-wit, the value of one million, five hundred thousand dollars (p. 44, par. 14.)

The defendants in said action, the plaintiffs in error here, then set forth the source of their title, alleging certain Mexican grants, the confirmation thereof by the United States, and the issuance of the patents therefor, averring that the lands sought to be condemned were contained within the patent boundaries of the

grants; that the Los Angeles river flowed through them in its natural course, and averred that as owners of the land, they were also the owners of all the waters percolating in the soil thereof, and also riparian owners, and had the rights of riparian proprietors, to the waters of the Los Angeles river (Trans. pp. 44-46, fols. 35-37). An amendment was filed to this answer, where they set forth their title more correctly, again pleading the Mexican grants, the confirmation by the United States, and that the lands sought to be condemned were situated within these grants; that the defendants were then owners of the said tracts in fee simple, and claiming the title thereto under and through the aforesaid Mexican and Spanish grants and the proceedings for the confirmation thereof and the patents issued by the United States founded thereon. They admitted the passage of the ordinance attached to the complaint as the authority for bringing the suit, but alleged that it was never published until after the commencement of the suit, and that by the terms of the ordinance itself, it did not take effect or go into force until the 9th day of June, 1893, and hence a day after the commencement of the suit. For the amendment, see pages 47-49, fols. 39-41.

In this state of the pleadings, the plaintiffs in error, defendants below, moved the court to stay all proceedings in this cause until the rights of the parties in the lands sought to be condemned, and in the waters of the Los Angeles river and the waters flowing beneath the surface of the bed thereof along the lands of the defendants and percolating in the soil of said lands, be finally determined by a court of competent jurisdiction; and that the motion would be made upon the ground that the rights of the respective parties to this suit, plaintiff on the one side the defendant in error here, and the defendants on the other, plaintiffs in error here, were in controversy in one suit then pending in Department 5 of the Superior Court of the County of Los Angeles, and another in the U. S. Circuit Court in the 9th circuit, for the Southern District of California, which suits were referred to in the affidavits in support of the mo-

tion, and also that the questions in controversy in said suits were as to the rights of the defendants, plaintiffs in error, to the uses of the waters of the Los Angeles river, as riparian owners, and the rights to the waters percolating in the lands belonging to them, and in this action described, and to the right of the plaintiff, the City of Los Angeles, to the waters flowing beneath the surface in the bed in said river and the right of the said plaintiff to enter upon the lands of the said defendants to develop the said waters underneath said bed, and which said rights were asserted by the plaintiff, the City of Los Angeles, as appeared upon the face of its amended complaint, and upon the ground that the said defendants were entitled to have their rights as riparian owners to the waters flowing beneath the bed of the Los Angeles river through the lands of defendants, and, as owners of said lands, to the waters percolating in the soil of the defendants determined, before a jury could properly estimate or determine the amount of compensation to be paid to defendants for the taking of said property. (Trans. pp. 49-50, fols. 42-44).

The affidavits in support of this motion show, substantially, these facts: That on the 19th of August, 1893, the City of Los Angeles had brought suit against these same defendants, Pomeroy and Hooker, which suit was brought in the Superior Court of the County of Los Angeles, and summons was issued thereon, and that the plaintiff, the City of Los Angeles, in that action had alleged and claimed ownership of all the waters of the Los Angeles river, and of its subterranean streams and springs from its source to where the stream leaves the south boundary of the city limits; and also claiming to own a certain ditch or canal on the lands belonging to the defendants, and which were sought to be condemned, and which said ditch was said to be of the capacity to carry 400 inches of water measured under a 4-inch pressure, and was the owner of the water so diverted by means of the said ditch, and that the defendants had entered upon the said ditch and diverted the waters therefrom and destroyed the dam, and threatened to continue to di-

vert the said water from said ditch and prevent its flowing therein, and claiming also that the City of Los Angeles had, through its officers and agents, continually, from the foundation of the pueblo, appropriated and used all the waters of the said river; and further stating that the defendants had appeared in that suit, and had made answer to the complaint, and denied that the City of Los Angeles was the owner of these waters, and denied the rights asserted by the city in the waters of the Los Angeles river, as well as the subterranean flow through the said valley. The affidavits also showed that on the 14th of February, 1896, the defendants, Pomeroy and Hooker, had brought a suit in the Circuit Court of the United States in the 9th circuit, for the Southern District of California, alleging their ownership of the lands mentioned in the complaint, and setting forth their interests in the water of the Los Angeles river as riparian owners, and their right and title to the percolating waters in the said soil, and claiming to be the owners in fee simple of said tracts of land, and of the percolating waters, and to the rights to use the water as riparian owners, and praying that the city might be enjoined from asserting any rights adverse to the title of defendants in this action, plaintiffs in error, and these suits were still pending and undetermined, and that although in this present action the city was ostensibly seeking to condemn the property of the defendants and take the same for public use, yet it was at the same time and in the same action asserting the rights of the city to the same property, claiming to be the owner of the whole of the waters of the Los Angeles river, denying any right on the part of the defendants thereto, and claiming to own the waters flowing beneath the bed of the said river, and seeking to condemn the lands as though the defendants were not entitled to either the waters percolating in said lands, or flowing in said river, and further alleging that the lands were of much greater value for the waters which they contained and which were percolating therein than for anything else, and that a jury could not make a fair and just estimate of the compensation to be paid to the defendants for

the property so sought to be taken until there had been a final determination of the rights of the respective parties to this suit, to-wit, of the City of Los Angeles on the one side, and of the defendants Pomeroy and Hooker on the other, with respect to their rights in the Los Angeles river and in the percolating wa ers. See the affidavits, Trans. pp. 50-54, fols. 4451. The time for hearing this motion was shortened and it was set for the 24th day of February, 1896; and on that day it came on to be heard upon the records, papers and pro ceedings mentioned, and the same having been argued and submitted to the court for its ruling thereon, the court thereupon, on Tuesday, the 25th of February, 1896, denied the motion, and the defendants then and there excepted. (Trans. p. 55, fols. 51-52). A bill of exceptions was settled, and is defendants' first bill of exceptions, which is found in the transcript at pages 49-55, folios 42-52. The defendants below, plaintiffs in error, moved the court to strike out certain portions of the amended comp'aint, namely, strike out of paragraph 2, the words, "and is fed by springs which rise to the surface in or adjoining the bed of the river."

2. Strike out from paragraph 2 of the amended complaint the words, "that the bed of said river from its source to the northern boundary of said city is composed of sandy soil into which the water sinks readily, and forms subterranean streams, flowing in well-defined channels beneath said bed, which said subterranean water rises to the surface in various places before reaching said city, and becomes part of the surface water of said river."

3. Strike out from paragraph 3, the words, "that the plaintiff is, and ever since its organization has been, the owner in fee simple of the exclusive right to the use of all the waters of said river, from its source to the southern boundary of said city, in trust for public purposes of supplying the inhabitants of said city with water for domestic purposes, and for supplying water for the irrigation of irrigable lands embraced in the four square leagues, and for other municipal uses in said city."

The motion was made upon the ground that the matters sought

to be stricken out were irrelevant and redundant because, the proceeding being one for the condemnation of the fee of said land, together with whatever else may be necessarily included as a part thereof, or incidental therto under the name of land, it was not competent for the plaintiff in such a proceeding to have settled or determined, or to otherwise have quieted or adjudicated, its title in or to any part of the defendants' lands or water rights, either riparian, surface, percolating or subterranean, therein or thereon, or any easements in or over defendants' lands, or any rights or interests of any kind therein or thereon. And upon the further ground that inasmuch as this is a special proceeding, the court had no jurisdiction to settle or determine therein any issue as to the title to the land or to water or water right, or to any interest therein, or any easements through or over the same which might be suggested or designated by plaintiff's complaint asking condemnation. Also, that while these paragraphs might be material in an action in the proper court in the proper suit to quiet a title, they were not relevant to the statement of plaintiff's right to have the condemnation of defendants' property. (Trans. pp. 56-57, where the notice of motion will be found).

The motion was made on the 28th of February, 1896, in pursuance of the notice, and was, by the court, denied. The defendants then and there excepted, and a bill of exceptions was presented to the court, and by the court settled and allowed on the 21st of March, 1896, and this constitutes the defendants' second bill of exceptions. (Trans. pp. 55-58, fols. 52-56).

A third bill of exceptions was made up, and present the exceptions taken to the order of court permitting the amendments to the complaint already referred to, and overruling the demurrer thereto. (Trans. pp. 62-69, fols. 63-75). And upon the order overruling the demurrer, it was then ordered and directed that the defendants' answer to the second amended complaint should stand as the answer to the complaint as amended. (Trans. p. 69, fol. 75). The bill of

exceptions was settled on the 4th day of April, 1896. (Trans. p. 69), and the motion to strike out parts of the complaint.

The question of whether an action for the condemnation of property could be united with an action to determine the rights of the parties plaintiff and defendant in that property, was thus raised by the demurrer, and decided adversely to the plaintiff in error. After the answer was filed in which the controversy between the parties in regard to the respective rights to the property was fully developed and the issues made, the question of the right of the court to proceed in the condemnation suit until these issues were determined, was raised by the motion made by the plaintiffs in error to stay the proceedings in the cause until those rights were determined and the motion to strike out parts of the complaint.

Second. The second question arose as follows:

The demurrer to the third amended complaint and the motion to stay the proceedings having been denied, the trial of the cause then proceeded, but in a somewhat peculiar and extraordinary manner. We began the trial of the title before the judge of the court without a jury, and we proceeded to take the evidence upon that controversy first, and the evidence contained in this transcript, beginning at page 71 and continuing down to page 190, was evidence taken before the judge, the jury in the meanwhile having been excused. And on Friday, March 6, 1896, the trial began before the jury. But the judge of the court did not decide the controversy between us at that time. The verdict of the jury awarding the sum of twenty-three thousand dollars as compensation for the part of the land taken, and two thousand dollars for damages to the remainder of the tract not taken, was given on the 1st of April, 1896 (trans. p. 58, fols. 56-57). Immediately following this verdict are the findings of fact by the court, which, although dated the same day that the verdict was given, were not filed until April 2, 1896 (trans. pp. 58-60, fols. 57-59), and the judgment follows (trans. p. 60, fols. 59-60).

Under the Code of Civil Procedure of the State of California, it is provided that a bill containing the exception to any decision may be presented to the court or judge for settlement at the time the decision is made, and after having been settled, shall be signed by the judge and filed with the clerk. (C. C. P. sec. 649.) And it is further provided that when a party desires to have the exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment if the action were tried with a jury, or after receiving notice of the entry of judgment if the action were tried without a jury, or such further time as the court in which the action is pending or a judge thereof may allow, prepare the draft of a bill, and serve the same or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken upon which the party relies, and within ten days after service, the adverse party may propose and serve amendments. And then follows the proceeding for the settlement of the bill of exceptions. (C. C. P. sec. 650.)

Under the provisions of this statute the plaintiffs in error presented what might properly be called the fourth bill of exceptions. It was a bill of exceptions to the decision of the court, and is contained in the transcript, from pages 70 to 307.

The statute of California also provides for a motion for a new trial upon divers grounds, and among others insufficiency of the evidence to justify the verdict or other decision, and that it is against law, and errors of law occurring at the trial and excepted to by the party making the application. (C. C. P., sec. 657, subs. 6, 7.)

A motion for a new trial was made in this case upon the said grounds, and a statement upon the motion for a new trial was prepared, and it will be found, trans. pp. 308-682, fols. 462-1072.

These, the bill of exceptions and the statement, it will be noticed, were settled the same day, March 25th, 1897, and in the bill of exceptions there was entered a stipulation that upon an appeal to the Supreme Court from the judgment in the cause, or from an order granting or denying a new trial, the bill of exceptions and the

statement on motion for new trial may both be used as part of the record on such appeal from either, that is to say, the defendants, on the appeal from the judgment, may make use of any part of the statement on motion for a new trial in the argument of any question raised on the exceptions contained in the bill of exceptions, and in like manner plaintiff may make use of any part of the said statement on motion for a new trial, as part of the record on appeal from the judgment, that may go to support their contentions upon the said questions raised in the bill of exceptions; and, in like manner, upon an appeal by the defendants from an order denying, or upon an appeal by the plaintiff from an order granting, the motion for a new trial, the bill of exceptions shall be considered as a part of the record on appeal from such order, and may be used by either party in like manner as if incorporated into the statement (Trans. pp. 306-307, fols. 459-460).

There was a stipulation inserted, also, as to the manner in which the maps and profiles which were exhibits in the cause might be bound together and attached (Trans. p. 307, fol. 460).

There were a large number of maps and profiles of such bulk and size that it was impossible to bring them into any transcript, any they were, for convenience' sake, put up in folios, and by stipulation between the parties to this record, they were not to be bound with the record, but might be referred to.

Tr. p. 825.

The motion for a new trial was denied, and the defendants below, plaintiffs in error, excepted (trans. pp. 686-687, fol. 1080).

As already stated, the taking of the evidence before the court on the issues joined upon the title to the property, was concluded on March 6, 1896 (trans. p. 190). And we then began the trial before the jury, upon the question of the amount of compensation. The trial had proceeded from the 6th until the 12th, and F. C. Finkle was then on the witness stand, called as a witness for the defendants, and at the session of the court, in the afternoon of March 12th, the court delivered an opinion upon the questions

which had been submitted to the court, and the court ruled: (1) That a fee simple title could be condemned for the purposes mentioned in the complaint; (2) That it sufficiently appeared that it was necessary to take 314 acres for those purposes; (3) That the city had a right to the waters of the river, which right was paramount to the rights of upper riparian properties. But he was not to be understood as saying that the city would have the right to go above the lands of the defendants and divert the waters of the river so as to deprive them of any use that they might make of the water going through the land, without compensation; that was a question upon which he had such doubts that he would not announce it as a rule in this case, particularly as he didn't think that portion of the defendants' rights was of such great value as to make it justifiable to take any risk on the subject. (4) That the right of the city extended, however, to *all* the water of the stream, whether it flowed on the surface or under the ground, and the rights of the defendants are subject to these rights of the city; (5) That this, however, gave the defendants, plaintiffs in error, a right to make whatever use of the water they could during any time when the city did not make use of it, either because it did not need it, or because it did not care to use it; that the right of the city extended only to the extent of its needs, and the rights come together at that point. So that whatever the value of the water was to the defendants by reason of the fact that the city might not, at all times, need *all* of it, is a right which they have to value in this case, and which the jury must determine in arriving at their verdict; (6) That he did not think it proper to state at that time what views he entertained in regard to what did constitute a stream of water, either above, or under, ground; those matters would have to be determined by instructions to the jury, as they would have to decide where the waters of the stream end, and the waters in the ground, not a part of the stream, begin.

The court further announced that that was only an oral an-

nouncement, and that findings would have to be drawn and signed (trans. pp. 214-217, fols. 310-315).

This was the only thing in the nature of a decision upon the rights of the parties in this property which was made by the court until after the jury had returned their verdict.

From the foregoing statement of facts out of which the second question arises, it will be seen that the court never did decide the rights of the parties until after the verdict of the jury was given; that the only thing in the nature of a decision was the oral opinion delivered as hereinbefore stated, and that does not correspond with the findings of fact and conclusions of law filed after the verdict in the cause, and the exception to the decision and to the verdict presents the second question hereinbefore stated, namely, if the action to determine the rights of the parties can be united with a proceeding for the condemnation of property and the ascertainment of the compensation to be paid, and the rights of the parties in that property are not determined until after the verdict of the jury is taken upon the amount of compensation, is not the proceeding in violation of the Fourteenth Amendment of the Constitution of the United States?

Third. The third question hereinbefore stated, namely: whether the order of the court compelling the plaintiff in error to litigate their title or right to a portion of the property in the same proceeding and at the same time that the question of the amount of compensation was being tried, was not denying the plaintiffs in error the equal protection of the laws in violation of the provisions of the said Fourteenth Amendment to the Constitution, arises out of the same facts and proceedings, and in the same manner.

Fourth. The fourth question, namely, whether the provisions of section 1249 of the Code of Civil Procedure of the State of California as construed by the court are not in violation of the Fourteenth Amendment of the Constitution of the United States,

COPY BOUND CLOSE IN CENTER

arises in the following manner: That section, so far as pertaining to the present matter, provides:

"Sec. 1249. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected in all cases where such damages are allowed as provided in section 1248)."

Section 1248 of the Code of Civil Procedure here referred to, so far as relevant to the present matter, declares:

"That the court, jury or referee must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:

"1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

"2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portions sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

"3. Separately how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damage, so assessed, the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value."

Upon the trial of this cause, the court instructed the jury as follows:

"25.

"In determining the actual value at the date of the summons, you are not to take, as the measure of that value, what an owner could realize at a forced sale, but the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property; and in making that estimate you should consider the use for which the property is suitable, having regard to the existing business or wants of the com-

munity, or such as might have been reasonably expected in the immediate future. You will also consider the fitness of this land for agriculture, and its value for that purpose, and for fruit or stock raising, for the timber growing on it, as well as the water which may be in the soil, not a part of the river, and from these and all other uses to which the property may be put from which profit may be derived, and from all the evidence on the subject, you will determine its actual market value at that date.

"26.

"The market value of the land is not necessarily the value of the land in its present or prospective use to the owner; nor is it the value which it would be to the city as a location for headworks; nor the sum which the city must be compelled to give for it by reason of the necessity it may be under to obtain it; nor is it the sum that could be derived from the land for any special purpose for which it may be suitable. All these things, if shown by the evidence, may be considered as bearing on the question, but only so far as it may appear that they affect the actual market value at the date of the summons, and the thing you are to determine is such actual market value at the date stated.

"27.

"Although you may believe from the evidence that by reason of things done, discovered or ascertained since June 27, 1893, it now appears that the land was then more valuable for any purpose or use than it was then known to be; yet you cannot consider such additional value unless you believe also that these things were sufficiently known or obvious in June, 1893, to affect the market value at that time, and did so affect it.

"28.

"If the jury find that any of the underground waters of the lands sought to be condemned are not a part of the waters of the Los Angeles river, they can consider that fact in fixing compensation only so far as it tended, if at all, to affect the actual market value of the land at the date of issuing the summons disregarding any acts done upon the lands or information acquired concerning said waters since said date.

"29.

"You are entitled to consider the evidence regarding the quantity of subterranean waters in the lands in question, and their value, only in arriving at a just determination of the market value of the lands sought to be condemned on the 27th day of June, 1893, wherefore, if you believe that said waters did not give said lands an additional market value at that date, or that if an additional market value were given, but the same did not equal the real value of said waters, then you must place on said lands a valuation equal only to the market value which they then had,

including such additional market value which said waters gave to said lands, irrespective of the true value of said waters.

"If, for instance, said lands could not have been sold in the market on said date (the owners having had abundant time to find a purchaser, such as would generally be taken by an owner trying to sell like property), for more than a certain sum, then you must not find the value of said lands to be greater than said sum, although in fact you may believe that the waters in said lands made them worth more than that sum."

(Tr. p. 652-653, Fol. 1024-1026).

And thus by these instructions the court did fix June 27, 1893, the date of the issuance of the summons, as the time at which the value of this property was to be determined, and did instruct the jury that the value which they were to ascertain was the market value, and also that if they believed from the evidence, that by reasons of things done, discovered or ascertained since June 27, 1893, it now, (that is at the time of the trial) appeared that the land was then more valuable for any purpose or use than it was known to be on June 27, 1893, they could not consider this additional value unless they believed that these things were sufficiently known or obvious in June, 1893, to affect the market value at that time, and did so affect it.

Now, upon the trial, evidence was introduced from which it might have appeared, and indeed must have appeared to the jury, that much had been discovered since the issuance of the summons that was not known at that time concerning the value of this land, for its underground waters, for although it was at that time known that the lands were what is known in the vocabulary of Southern California, as "water bearing lands," yet all through the trial it was made manifest by the evidence that in the very preparations for the trial, made within a few months before the trial, these lands had been explored and tested to such an extent as they never had been before. Indeed, nearly all of those tests which had been made were made within a short time before the trial. Among those tests, and those which were of the most satisfactory character, were the following:

Friel, a civil engineer who had been employed by the plaintiffs in error to make investigations in this land (trans. pp. 339-340, fol. 516), bored many wells in this land (id. pp. 340-341); had inspected other wells (id. pp. 341-342), and knew the cuts that had been made on this tract of land within two or three months previous to the time of his testimony, for the purpose of ascertaining what was the formation beneath, and what it contained. There were two, one at the eastern end and one at the western end, in the 22-acre tract, and marked on the map "Pomeroy & Hooker's Lower Development." That is the eastern cut; the western cut is of the same description, and marked "Pomeroy & Hooker's Upper Development." There was another cut nearer the well at No. 147 of the map. It was the first well put down by Mr. Audson, which cut was about 290 feet in length. The cut at the well was about 8 feet in depth, and runs out to about a foot and a half at the lower end. The eastern development cut would average about 8 feet in depth, and the western about 9 feet. The length of the upper development was 600 feet, and of the lower 1500 feet (id. p. 342).

He was recalled by the plaintiff (trans. p. 400), and goes extensively into the formation of the cut and what was discovered by the wells bored and cuts made, and says where the river enters the land on the west there was at the time of his measurement, 1073 inches flowing, and at the lower end where it leaves the land, 2062 inches. The river between these points does not receive any sudden influx of water from any place that he had observed; the increase was gradual, from the percolations on each side, and from the water from below. He could see on the banks of the Los Angeles river that it is supplied by percolations from the soil; can observe in the bottom of the stream evidences as to whether any portion of it is supplied by upward pressure, and there was no material difference in the manner in which the Los Angeles river waters are increased from one of these points to another so far as

his observation went, from what occurred in the cuts that were made, they were very similar (Trans. p. 405).

He was of the opinion that by the construction of the tunnels and laterals which the city itself was proposing to make, 300 inches measured under a 4-inch pressure could be taken from the soil without drawing in any manner from the Los Angeles river (trans. pp. 403-404).

The Pirtle development referred to on page 404, is an excavation of the same character as those in the Pomeroy & Hooker tract. The material is somewhat coarser (id. p. 404). But this cut was made long after the issuance of the summons in this case. He made measurements of the water in these cuts on the tract belonging to the plaintiffs in error, and sought to be condemned, during the progress of the work on the lower excavation; when the lower cut had extended about a thousand feet in length, he made a measurement and found about 60 inches or a little over. On February 15th he made a measurement and found about 121 inches; on March 1st, about 125. They had, on the same day, measured the water in the cut at 300 feet from the upper end of the lower cut and found 25½ inches. The upper cut is located about ¾ of a mile westerly from the head of the ditch, that is of the city ditch, higher up the river; the cut extends in a northwesterly direction, and he measured the water in that cut February 15th, and found 76½ inches at the mouth; measured it at 300 feet, in the center of the excavation, and found 17¾ inches. The increase is a gradual increase; at the head of the excavation there is practically no water; it commences at nothing and increases to 76 at the lower end of the cut (id. pp. 405-406).

Nudson had been engaged in the boring of wells along the river in the Pomeroy & Hooker tract about two months; bored six wells, and referred to various strata through which he passed, and then he gives an account of the strata (trans. pp. 337-339).

He is recalled (trans. pp. 346-349).

The testimony that he gives in the places cited shows the char-

acter of the material through which he passed. They are so similar that it is scarcely worth while to notice more than one, for while they differ slightly, the difference is not of any materiality to any question we are now considering. "Well No. 1 was bored on the south side of the river, a 10-inch well; got water at 5 feet from the surface. It was soil or sand down to that. From 5 to 13 feet, fine sand; 13 to 21 feet, sand and some few boulders mixed; 21 feet to 21 feet 6 inches, clay, no water in the clay. There was clay between the 13 and 21 feet. From 21 feet 6 inches to 29 feet, gravel with water. From 29 feet to 30 feet clay, no water; 30 feet to 62 feet 6 inches boulders and gravel with water; 62 feet 6 inches to 63 feet, clay. There was water from 62 feet 6 inches; raised about 6 inches in the pipe about the starting point, above where I first struck it, that is, when I struck that stream of water, water raised 6 inches higher in the pipe than it was before. From 63 to 65 feet, gravel; there I had a rise of water. From 65 to 69 inches, clay and cement with boulders; no water in it. From 69 feet to 79 feet, gravel with water in considerable quantities; 79 to 89 feet, boulders and gravel, very coarse material, bearing good water; from 89 feet to 115 feet, gravel and boulders, with water; 115 to 119 feet, clay, no water. From 119 feet to 123 feet, sand, with water, but not very much; from 123 to 127 feet, clay and gravel mixed, no water; 127 feet to 145 feet, cement and gravel, no water; 145 to 165 feet, clay, no water; 165 feet to 176 feet, sand, apparently dry; 176 feet to 193 feet, broken up granite, decomposed, no water; 193 feet to 205 feet, hard rock, no water in it that I could discover. That was the end of the well. The bottom of the strata bearing water was apparently at 123 feet."

"The surface of the ground at the point where that well was bored, was at an elevation of between 8 and 10 feet above the surface of the river, as near as I could judge. The point where that well was bored, was from half to three-quarters of a mile above where the ditch of the city takes water from the river, and

to the west of the river and on the same side. That well is right at the head of the middle cut. When the water raised in the pipe, as I have stated, it did not subside immediately, but stayed there all the time, and didn't lower until the pipe was punctured or a hole drilled in it at the bottom of the ditch to let the water out." (trans. p. 337).

Mr. Burr Bassell was a witness for the city, and had been employed by the city in exploring this country (trans. p. 499). He then testifies concerning the wells bored by him, and the various strata which he found in those investigations (trans. pp. 499-509).

Mr. Lownes was also a witness for the plaintiff upon the same subject. He had been in charge of these borings by the city, at the place called "The Narrows," near the city (trans. pp. 512-514), and these were made while the trial was going on. The number of wells bored upon the Pomeroy & Hooker tract for the city, were about 45; we had, therefore, the two principal cuts on the Pomeroy & Hooker tract, the smaller cut of 200 and odd feet, the Pirtle cut, and over 50 wells bored on this tract, besides innumerable wells bored nearer the city in substantially the same kind of soil, and in the Los Angeles river bottom, all either during the trial or within two or three months preceding the commencement of it, and the testimony of all the witnesses as to the amount of the water flowing underground in the tract of land sought to be condemned was based almost entirely upon these recent investigations. And there was other evidence also in the same direction, tending to prove that the knowledge of the public generally concerning the amount of subterranean waters in this tract at the date of the issuance of the summons was comparatively nothing; that the knowledge of its wealth in these waters had been acquired mainly by these recent investigations. And upon the theory that the existence of these waters at the date of the issuance of the summons, if that existence was known, could not have affected the market value of the property, the learned judge

of the Superior Court gave the instructions which we have above set forth, and intended thereby to exclude from the consideration of the jury the value which this tract might have for those subterranean waters, so far as the knowledge of their existence or the amount of such waters had become known since the date of the issuance of the summons. And although section 1249 of the Civil Code of Procedure declares that *the actual value* at the date of the issuance of the summons was the measure of compensation, yet the learned judge of the Superior Court construed that term to mean market value, and the Supreme Court of the State of California affirmed that interpretation.

It was testified by Friel and other experts on behalf of the defendants, that 3000 inches of water could be developed in that tract of land without diminishing the quantity of water flowing in the surface flow of the Los Angeles river anywhere, and the lowest estimate of the amount by the defendants' witnesses was 2000 inches. The experts for the plaintiff did not differ very greatly in the main from the witnesses for the plaintiffs in error, except that upon their theory, that the whole valley from mountain to mountain was Los Angeles river, they of course insisted that if a bucketful of water were taken out of this valley it would diminish the quantity of water flowing in the river. As to the value of this water, there was no contradiction of the testimony on behalf of the plaintiffs in error at all.

Fred W. Wood, one of the witnesses of plaintiffs in error, said that if anywhere from 500 to 3000 inches of water, measured under a 4-inch pressure, could be developed on that tract at that altitude, it would be a conservative estimate to say that it was worth at least from $500 to $750 an inch (trans. p. 223).

Pirtle said that anywhere from 1000 to 3000 inches would be worth $1000 an inch, and if as little as 500 inches, he would not value it at over $500 an inch (trans. p. 435, fol. 673). He is the Pirtle from whom the "Pirtle cut" took its name, and gives an account of the construction of it, and it was constructed in the

fall before, that is, in 1895. They commenced work on September 10th (trans. pp. 436-438).

Clark put the value of the water per inch at $1200 to $1500, but thought it was worth from 25% to 33 1-3 % more now than it was in June, 1893 (trans. p. 440, fol. 681).

Charles C. Brown testified that the value of the water, if he could develop from 500 to 3000 inches, was worth $2000 an inch (trans. p. 445, fol. 689).

Bouton puts the value at $1000 an inch (trans. p. 444, fols. 686-687).

Monroe puts it at $600 an inch (id. p. 446, fol. 690).

It is unnecessary to cite further testimony, for, as already stated, none of these witnesses were contradicted by any testimony on the part of the plaintiff. And in this state of evidence, the court gave the instructions which we have already set forth, and out of these facts arises the question as to whether fixing the compensation to be paid for private property taken for a public use at its market value at the date of the issuance of the summons, notwithstanding at the time of the trial it is known to be actually worth twenty-five to fifty times that market value, is taking private property for public use without just compensation, and therefore depriving one of his property without due process of law.

Fifth. Has the City of Los Angeles any such prior and paramount right to the waters of the Los Angeles river, either surface or subterranean, as was adjudged in this case?

On the 25th of August, 1844, Manuel Micheltoreno, then governor of the department of California, granted to the City of Los Angeles, a certain tract of land now situated in the County of Los Angeles and State of California, and on the 26th day of October, 1852, the Mayor and Common Council of said City of Los Angeles, that being the then corporate name of the city, filed their petition with the land commissioners appointed to ascertain and settle the private land claims in the State of California, in which they claimed the confirmation of their title to a tract of land des-

ignated as the "City of Los Angeles," and which they claimed to contain 16 square leagues. And the board of land commissioners, on the 5th day of February, 1856, rendered a decree of confirmation to the following effect: "In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the said petitioners is valid for the land hereinafter particularly mentioned and described; it is therefore decreed that the same be confirmed to them; and as to the remaining portion of the premises described and claimed by them in their petition to this commission, it is adjudged that their claim is invalid, and their application for confirmation is therefore rejected. The land of which confirmation is hereby made is situated in Los Angeles county, and contains 4 square leagues of land."

Appeals were taken from this decree, but which were finally dismissed and the decree was confirmed.

And thereafter, to-wit, on the 9th day of August, 1866, a patent was issued by the United States to the said Mayor and Common Council of the City of Los Angeles. There was another patent issued to the same body on the 4th of August, 1875, but it was in the same form and to the same effect, and added nothing to the title which had vested in the city by the patent of 1866. The patent will be found in the transcript, pages 72 to 75, and the patent of 1876, pages 76 to 77 of the transcript; in the latter the facts are more fully recited and in accordance with the above statement.

On he 20th day of October, 1784, Governor Pedro Fajes, then the Spanish governor of California, granted to José Maria Verdugo a tract of land called "San Rafael," and on the 12th day of January, 1798, Governor Borica made a similar grant to the same party of the same tract. These grants were presented to the board of land commissioners, and the claim was decreed to be valid and this decree was confirmed and a patent was issued to Julio Verdugo and Catalina Verdugo and their heirs for the said tract of land, to have and to hold the same, with the appurtenances, etc. (Trans. pp. 122 to 125, fols. 161 to 165).

On the 20th day of October, 1784, Governor Pedro Fajes, then governor of the department of both Californias, granted to an Indian, José Miguel Triumfo, a certain tract of land, Cahuenga. Alexander, Mellus and Olivera, succeeded to the title of Triumfo prior to the change of flags, and presented a petition to the board of land commissioners for a confirmation of this grant, and it was confirmed, and on the 2nd day of August, 1872, a patent was issued by the United States to Alexander, Mellus and Olivera, for a part of that tract described in the patent. This was a small tract of land containing one-fourth of a league, a little more or less. (See Trans. pp. 125 to 128, fols. 166 to 170).

On the 23rd day of March, 1843, Manuel Micheltoreno made a grant to Vicente de la Osa of a certain other tract of land, known by the name of "Providencia," and a petition for the confirmation of this grant was filed by David W. Alexander and Francis Mellus (who had acquired an interest therein) before the board of land commissioners, and the grant was confirmed and a patent issued to them on the 6th day of August, 1872. (Trans. pp. 128-130, fols. 170-175).

It will be observed that all of these patents are in the usual form, including the patent to the city. All purport to convey a fee simple title, subject to the claims of third persons, and without any other exceptions, reservations or limitations upon the operation of any of these grants. The defendants in this action claimed the lands in controversy by divers mesne conveyances under and through these Mexican grants and United States patents. (See trans. pp. 320 to 322). These deeds of conveyances and instruments of every kind forming the parts of the chain of title of the defendants, were also in the usual form, and contained no reservations or limitations upon the title conveyed except as in the record stated. They all purported to convey a fee simple title of the property. (So stated in the record trans. p. 322).

The Los Angeles river rises in the San Fernando Valley above the lands in controversy, and to the north or northwesterly of

those lands, and flows in a general southerly course, but in its passage through the lands sought to be condemned in this action, in a southeasterly or more of an easterly direction, and after passing the lands here involved, it flows through the Los Feliz ranch, and from thence enters the northern boundary of the city, flowing southerly through the city limits. Furthermore, the Los Angeles river flows through the lands in controversy, and through each of the tracts, that is, it flows through that portion that lies within the Cahuenga, and that portion which lies within the Providencia, and the portion which lies within the San Rafael (trans. p. 125, fol. 166; p. 128, fol. 170; and p. 132, fol. 177). It was stipulated that the Los Feliz rancho was a Mexican grant, and extended from the north patent boundaries of the city upon the west side of the river in part, and in part upon both sides of the river, and extending northwesterly to the eastern boundary of the San Rafael and Providencia ranches (id.). The patent to that ranch is also set forth, so far as material to the case (trans. pp. 188-189).

On the 30th day of August, 1884, the City of Los Angeles purchased from Griffith Jenkins Griffith one-half of all of Griffith's right, title and interest in and to the waters of the Los Angeles river, and the same was conveyed to the city by Griffth at that time, and at the same time he entered into an agreement with the city to sell the remaining one-half, and on the 19th of August, 1885, he made a deed to the city for the remaining one-half of his right to the waters of the Los Angeles river. This right was claimed by Griffith as appurtenant to the Los Feliz rancho, of which he at that time owned a part. And also any remaining right which he might have to use any portion of the waters of the Los Angeles river for any purpose on the Los Feliz rancho, or elsewhere, with certain rights of way over the lands which he owned. For the rights thus conveyed by Griffith, see trans. pp. 83-86.

It will be noticed, however, that the defendant in error was

quite strenuous in its insistance that it didn't get any right to any water of the Los Angeles river by this transaction with Griffith. (trans. pp. 86-87).

The defendant in error also introduced a judgment recovered by the City of Los Angeles against Griffith, of date August 19, 1885 (trans. pp. 87-88, fols. 105-106), but that judgment was made on the same day that Griffith made the conveyances, and in the action in which the judgment was recovered Griffith filed a disclaimer (trans. p. 88, fol. 106), so that it is evidence that this decree quieting the title was merely another method of assuring the title to the city.

The defendant in error also introduced certain papers taken from the record in another suit, and among them the so-called plan of Pitic, which was introduced against the objection of the defendants as evidence in the case, upon the ground that whatever was the law of Spain or Mexico, and so far as applicable to any of these Mexican grants or to the pueblo of Los Angeles, they were for the purpose of the preservation of the rights of property that accrued under them, a part of the law of California of which the court would take judicial notice (trans. p. 82, fols. 96-97. See further, trans. p. 88, fols. 106-107).

The defendant in error introduced first a communication from the commandant general of the Californias to Gen. Fernando de Rivera y Moncada concerning the occupation of the channel of Santa Barbara, and the erection of the town of Los Angeles in 1779, in which was recited the determination of the government to found a pueblo in the name of "Reina de los Angeles" on the river Porciuncula, and the governor directs Rivera to carry out the said determination under certain instructions, among them to settle the said pueblos with families and soldiers told off from the garrisons in order to increase the population of the province, and for the special purpose of stock raising. This paper bore date, December 27, 1779.

A second communication was introduced from the command-

ant general to Governor Neve, empowering him to establish a fort at Santa Barbara, and the two pueblos, which bore date the 22nd of September, 1780 (one of which pueblos was Los Angeles), and with a view to land and water for cultivation so that the general expenses of the government might be paid by these and similar establishments.

Third, a communication from the governor of the Californias to the Viceroy concerning the establishment of San Jose and Los Angeles, dated 1775 to 1790; Refers to the previous orders in regard to the founding of the two pueblos on the rivers Guadalupe and Porciuncula respectively on account of the fertility of the soil and the abundance of the waters for irrigation, and refers to the importance of the enterprises in order to render the province independent in the matter of rain supply. (Trans. pp. 89-90, fols. 107-109).

A fourth communication from the commandant general to the governor concerned the establishment of the towns of San Jose and Los Angeles. This also was without exact date, but somewhere from 1775 to 1790. It referred to two places existing in the province between San Diego and San Francisco, with facilities for irrigation, for cultivation and agriculture; that one of these places was near the river of the Porciuncula, 42 leagues from San Diego and 2 leagues from the mission San Gabriel, the other being on the Guadalupe river. Recited his desire to found pueblos at those points in order to furnish grain for the three presidios of the province. His selection of 9 soldiers practiced in agriculture, and 5 farmers with their families, for each of said pueblos, and the setting apart to each settler, beside the lot on which he erected his house, certain irrigable lands for the planting of one fanega of corn, with horses and cattle of all kinds, tools, etc.

Fifth, was a decree of the governor for the establishment of the pueblo of Los Angeles, dated August 7, 1781, and provides for the foundation of the pueblo in the immediate vicinity of the

river, all of the lands capable of irrigation should be carefully examined, and that point selected for the erection of a dam which would insure the distribution of the water to the greater portion of the lands; that the site of the town should be chosen on elevated grounds so as to enjoy the north and south winds, and avoid the risk of inundation, but as near the river and main ditch as possible. Provided for a public square or plaza, division of arable lands into plots or lots, each plot (or suerte) to be 200 varas square, which is the space generally required for the planting and raising of a fanega of corn. All building lots or arable tracts should be distributed in the name of the king, reserving to the crown one-fourth of the arable or dry lands for the benefit of new settlers; assigning also certain plots or tracts as the property of the pueblo. And provided also for the demarcation of lots and tracts. (Trans. pp. 90-91, fols. 109-110).

The sixth paper was this alleged plan of Pitic, dated Nov. 14, 1783. The instructions approved by his majesty, and made for the establishment of the new town of Pitic in the province of Sonora, and ordered to be adopted by the other new projected settlements and by the others which might be established in the district of the general commandancy. The 6th section provided that within four leagues assigned as the limits of each pueblo, all pastures, woods, water privileges, hunting, fishing, stone quarries, fruit trees and other privileges be for the common use of Spaniards and Indians residing therein, and in its suburbs or villages.

Section 7 provides that the residents and natives should enjoy equally the woods, pastures, water privileges and other advantages of the royal and vacant lands that might be outside of the land assigned to the new settlement, in common with the residents and natives of the adjoining and neighboring pueblos, which privilege was to be enjoyed subject to his majesty's order.

Section 19 declared that the advantage of irrigation being the principal means of fertilizing the lands, and the most conducive to the increase of the settlement, the commission should take par-

ticular care to distribute the waters so that all the land that might be irrigable might partake of them, especially at the season of spring and summer when they are most necessary to the cultivated land in order to insure the crops, for which purpose it was directed that the territory be divided into districts (partidos) or hereditaments, marking out to each one a trench or ditch starting from the main source, by which the quantity of water can be regulated in accordance with the needs of each settler throughout the different seasons of the years, so that each settler should know the ditch on which he is to depend, and should be restricted to its use and to a certain quantity of water so that those below him might not be injured.

The 20th section provided for the appointment of one alcalde (manador) to each trench or ditch, who should have charge of the distribution of the waters and should also cause such lands as the owners might neglect, to be irrigated at the expense of the owners.

The 24th section vested the ayuntamiento with power and authority to make, promulgate and enforce all necessary laws, rules and regulations not contrary to the general laws for the government of the settlement (trans. p. 91, fols. 110-112).

The seventh paper was the opinion of the attorney or assessor of the commandancy on the subject of the concession of land, etc. Recites something of title 14 article 8 of the instructions which treated of the political government of California, and the regulations approved by his majesty the 24th of October, 1781, and which directed that the new settlers should enjoy, for the maintenance of their stock, the common advantages of waters and pastures, wood and timber of the common forests and pasture grounds which, in compliance with the laws, are to be marked out for every pueblo and that each settler should enjoy privately the pastures of his own land, limiting each to 50 head of each kind of cattle.

Recites 5th, the law of title, 17, book 4, of the Recopilacion for

the territories which provides that the use of the grazing lands (pastos) wood and waters of the Indies should be common to all the residents thereof that they might enjoy them freely with their cattle and the right of pasture, etc. The allotting of tracts of land for cattle claimed by settlers in California and proposed by the governor November 20, 1784, should not be made within the boundaries assigned to each pueblo, which, in conformity to law 6, title 5, book 4 of the Recopilacion must be 4 leagues of land in a square or oblong body, according to the nature of the ground, because otherwise they would become private owners of forests, water, timber, wood and other advantages, so depriving their neighbors of these benefits, which is plainly at variance with the intention of the said laws, and express provisions of article 8 of the instructions for settlements in the Californias according to which all the waters, pasture, wood and timber within the limit of each pueblo must be for the common advantage, so that all the new settlers may enjoy and partake of them, maintaining thereon their cattle and participating in the other benefits that might be produced (trans. pp. 91-93, fols. 112-114).

Other papers of a like character were introduced, of which abstracts are made and printed in the transcript, pages 93-100, fols. 114-125. But it is not perceived that they have any greater bearing, or add any force to those portions which have already been set forth. And besides, as they are matters of judicial notice, if they exist at all, and will be referred to further along in this brief, we deem it unnecessary to make further extracts at this point.

Defendant introduced in evidence divers statutes of the State of California, namely:

On the 11th of March, 1850, the legislature of the State of California passed an act entitled "An Act to provide for the incorporation of Cities." And in the second section, it was declared that when any city was incorporated by a special act of the legislature, such act may simply define the boundaries of the city, and declare it incorporated, in which case it shall be deemed in-

corporated, according to the provisions of this act, or it may declare it incorporated under the same, with such changes as may be specially named. (Stats. of 1850, p. 87).

This act prescribed the mode of incorporating cities otherwise than by a special act of the legislature, and the powers which should pertain to such municipality, and also provided the officers which were to be elected for the exercise of those powers. That act did give to such municipality the power to provide for supplying the city with water, and also the power to establish a fire department, and make regulations to prevent and extinguish fires, and to establish a board of health and cause the streets to be cleaned and repaired, and to erect and maintain poor houses and hospitals, and prevent the introduction and spreading of diseases. (Stats. of 1850, pp. 88-89, sec. 11).

But it did not purport to confer upon cities so organized any rights merely by virtue of its organization, in the waters of streams flowing through such municipalities, nor did it declare or attempt to define what, if any, rights were possessed by the Mexican pueblos in the waters of such streams.

The City of Los Angeles was incorporated by an act of the legislature of California passed April 4, 1850, entitled, An Act to incorporate the City of Los Angeles, in which all of that tract included within the limits of the pueblo de los Angeles as theretofore known and acknowledged, should thenceforth be known as the City of Los Angeles, and it was declared incorporated according to the provisions of the act entitled, "An Act to provide for the incorporation of cities, approved March 18, 1850, and providing that if such limits included more than four square miles, the council should, within three months after they were elected and qualified, fix, by ordinance, the limits of the city, not to include more than said quantity of land, and the boundaries so determined should thenceforth be the boundaries of the city; that the number of councilmen should be seven, and that the corporation created by that act should succeed to all the rights, claims and

powers of the Pueblo de Los Angeles, in regard to property, and should be subject to all the liabilities incurred and obligations created by the Ayuntamiento of said city (Stats. of 1850, p. 155).

As already stated, the pueblo did comprise more than four square miles, and its claim to land was confirmed and a patent issued, for four square leagues.

On April 5, 1851, the legislature passed an act entitled "An Act supplementary to An Act entitled, An Act to incorporate the City of Los Angeles, by which, in the 3rd section, it was declared that the corporation of the City of Los Angeles shall retain all the powers and rights *promised* by the former Ayuntamiento of said city over the public lands belonging to said city, and not included within its present incorporated limits; to lease, sell or otherwise dispose of said lands, as also to take from the river of Los Angeles the water needed for irrigation of said lands by means of a dam or dams built without the incorporated limits aforesaid; but the said corporation shall exercise no municipal authority over said lands except to regulate the taking and distribution of water for irrigation as aforesaid (Stats. of 1851, p. 329).

On May 1, 1850, another act was passed supplementary to the act incorporating the city, by which, in the first section, it was provided that the boundaries of the City of Los Angeles should be so changed as to embrace within its limits all the lands belonging to the former Pueblo de los Angeles, provided that a majority of the inhabitants resident on the land aforesaid situate without the present limits should unite in an application to the county court praying for the change of boundaries aforesaid; also providing that all the provisions of the act for the incorporation of cities should be observed in the change of boundaries except the limitation to four square miles, which should not apply to the City of Los Angeles. The 3rd section declared that the common council should have power, and it was made their duty, to pass ordinances providing for the distribution of water for irrigating the said lands (Stats. of 1852, p. 186, secs. 1, 2 and 3).

On April 13, 1854, an act was passed by the legislature explanatory of the incorporating act of 1850, and it was provided that that act should be construed to vest, and to have vested, in the mayor and common council of the said city, the same power and control over the distribution of water for the purposes of irrigation or otherwise, among the vineyards, planting grounds and lands within the limits claimed by the ancient pueblo and ayuntamiento de los Angeles, and by the said mayor and common council as the Ejidos or commons of said city, the possession whereof was thereby declared to be in the said mayor and common council (stats. of 1854, p. 63).

On February 1, 1872, the legislature of the State of California passed an act entitled, An Act to enable the inhabitants of territory adjacent to any city in the state, to annex the same thereto (Stats. of 1871-2, pp. 50-52).

On March 10, 1874, an act was passed by the legislature of the State of California, entitled "An Act to promote irrigation in the county of Los Angeles." It created the office of superintendent of irrigation for the county, and prescribed his duties; which were (1) to promote an efficient, and as nearly as possible, a uniform system of irrigation throughout the county. (2) To superintend, advise and direct the water commissioners thereafter provided for of each and every irrigation district in the county. (3) To visit different parts of the county whenever he might deem it advisible for the purpose of inspecting and initiating works of irrigation of any kind, and to take all needful steps to improve the same. (4) To make an annual report to the board of supervisors, of his official doings. (5) It provided for a salary to be fixed as in the act provided. And (6), For his oath of office. This act had for its object the providing of a general and uniform system of irrigation, and the control of it, to a considerable extent, by the board of water commissioners, under the supervision of this superintendent. We are not aware that there is anything in the act bearing upon any question in this case other

than the 13th section, and it was for that 13th section that it was undoubtedly introduced. That section declares that nothing contained in the act should be construed as applying to the City of Los Angeles or to the waters of the Los Angeles river, which were thereby specially exempted from its operation (Stats. of 1873-4, pp. 312-318).

The next act introduced was an act approved March 26, 1874, to amend the charter of the City of Los Angeles, define its limits and rights, enlarge its powers, and providing for its more efficient government.

Section 1 of Article II of this act was as follows:

"That there be, and hereby is, granted to said corporation, to be by it held, used and enjoyed in absolute ownership, the full, free and exclusive right to all of the water flowing in the river of Los Angeles at any point from its source or sources to the intersection of said river with the southern boundary of said city; also the right to develop, economize, use and utilize all waters flowing beneath the surface in the bed of said river, at any point or points between the points of termini above given, and for that purpose it is hereby declared that the powers to condemn property outside of the limits of said city given by the provisions of section 2, Article II, of this act, in so far as the same relate to the condemnation of property in water for increasing the water supply of said city, are intended to be given and to be restricted to such sources of supply and to the rights therein, excepting and reserving from the operation of the aforesaid grant of water flowing in said river, unless the same be condemned and taken for public use as herein provided, all vested private rights to the water flowing upon the surface or beneath it in the bed of said river."

Stats. 1873-4, pp. 633-634.

This was followed with a provision prohibitng the city "from in any manner disposing or transferring or conveying any portion of said water, or any right to develop or use the same or any portion thereof, to any corporation, association, individual or other person who might or would use the same in any way prejudicial to the use thereof for irrigation within the limits of said city, or who might, or who would, at any time, for any good or valuable consideration, desire to sell or in any way dispose of to any other person, natural or artificial, any interest therein or right

to the use thereof; "And provided further that the zanjas which are within the limits of the said city known as the principal zanja, and zanjas numbers 1, 2, 3, 4, 5, 6, 7 and 8 are hereby declared public zanjas, and the quantity of water which has heretofore generally flowed in each one of said zanjas is hereby declared to be the quantity which by right belongs to each one of said zanjas and to the farmers and fruit growers who are benefited by their use."

Stats. of 1873-4, p. 633-634.

The next statute introduced was the act of April 1, 1876, to revise this act to amend the charter of the city, define its limits, etc., which was approved March 26, 1874. (See Stats. of 1875-6, p. 692).

The first section of the second article of this act is substantially the same as the act of March 26, 1874, and in this particular is literally the same.

The next act introduced was an act approved March 30, 1878, which was an act to amend the act entitled "An Act to revise an act entitled 'An Act to amend the charter of the City of Los Angeles,' etc., approved April 1, 1876. (See Stats. of 1877-8, p. 642). The first section of the second article of that statute, so far as pertaining to this case, is as follows:

"There is hereby granted to said corporation, to be by it held and enjoyed in absolute ownership, the full, free and exclusive right to all the water flowing in the river Los Angeles at any point from its source or sources to the intersection of said river with the southern boundary of said city; also the right to develop, economize, use and utilize all waters flowing beneath the surface in the bed of said river at any point or points between the points of terminii above given, and for that purpose it is hereby declared that the powers to condemn property outside of the limits of said city given by provisions of section 2, article 2, of this act, in so far as the same relate to the condemnation of the property in water for increasing the water supply of said city, are intended to be given and to be restricted to such sources of supply and to the rights therein, and provided that said corporation shall not in any manner dispose of, transfer or convey any portion of said water or any right to develop, or use the same or any por-

tion thereof, to any corporation, association, individual or other person who might or would use the same in any way prejudicial to the use thereof for irrigation, domestic and culinary purposes, within the limits of said city, or who might or would at any time, for any good or valuable consideration, desire to sell or in any way dispose of, to any person natural or artificial, any interest therein, or right to the use thereof. And provided further that the said corporation, by ordinance duly enacted by its council as hereinafter provided, shall have the power (1) to declare and make all zanjas now existing or hereafter constructed within the limits of said city, public zanjas. (2) To fix, regulate and control the amount and distribution of the water which shall run and be contained in, and conveyed by, each and every one of said zanjas. (3) To make and enforce all rules and regulations necessary to maintain and protect said zanjas and the waters flowing therein, and to prevent the defilement of portions of said waters by throwing into said zanjas of any filth or matter detrimental to the public health, or by discharging therein contents of any drains, sewer or sink, or in any other manner whatsoever, and to provide for the prosecution and punishment of all persons, in the proper courts, offending against said rules and regulations.

(4) To alter, enlarge, extend, improve, close and vacate all such zanjas as the public interest may demand."

Stats. 1877-8, p. 643.

In the second section power was given to the corporation to purchase, hold and receive property, real and personal, either within or without the limits of said city, for any or all of the following purposes, to-wit:

"First..... Second..... Third..... Fourth, for the construction, maintenance and operating of waterworks, dams, reservoirs, ditches, canals and other means to supply the city and its inhabitants with water for the purposes of domestic use and of irrigation, and to distribute such water, either in zanjas, ditches, pipes or otherwise, into, upon and over the lands within the limits of said city, or for either of said purposes. Fifth..... Sixth..... Seventh, For the purpose of laying out, building and constructing sewers, drains, cesspols, or either."

Statutes of 77-8, pp. 643-644.

It will be noticed that in this legislative grant or declaration of the rights of the city, there was no exception made of the vested private rights in said waters.

The next statute that was introduced is the charter of the City of Los Angeles, approved by the legislature in 1899 (Stats. of 1889, pp. 459-512).

Here it may be proper to note that by the constitution of California, adopted in 1879, and amendments passed thereto, provision was made for the people of a city of a certain number of inhabitants, to elect 15 freeholders to frame a charter for the city, which, when adopted by the people and ratified by the legislature, becomes its charter. The act or joint resolution now under consideration was a joint resolution approving a freeholders' charter for the City of Los Angeles. This charter, in article 1, section 2, subdivision 15, declares that the said corporation shall have power to acquire, by purchase, condemnation or other lawful means, property, both real and personal, including water and water rights, within or without the corporate limits, necessary or convenient for municipal purposes or for the exercise of the powers granted to the said corporation (Stats. of 1889, p. 458).

The 17th subdivision empowers the city "to provide and maintain a proper and efficient fire department, and make rules and regulations for the prevention and extinguishment of fires. To make and enforce, within its limits, such other lawful rules, sanitary and other regulations as are not in conflict with general laws, and deemed expedient to maintain public peace, protect property, protect public morals and preserve the health of its inhabitants." (idem).

But this charter deals with the water and water rights of the city in Article 18, Stats. of 1889, pp. 502-503. Section 1906 of this charter declares:

"The City of Los nAgeles shall continue in the ownership and enjoyment of all rights to the waters of the river Los Angeles heretofore vested in it, its predecessor or predecessors, including the pueblo of Los Angeles, and is hereby declared to have the full, free and exclusive right to all the waters flowing in the said river, at any point from its source or sources to the intersection of said river with the southern boundary of said city, and also the ownership of, and the right to develop, economize, control, use and uti-

lize all waters flowing beneath the surface of the bed of said river at any point or points between the points of terminii above named."

Section 191. "The said city shall not convey, lease or otherwise dispose of its right in said waters or in any part thereof, or grant or lease to any corporation or person, any right or privilege to use, manage or control the said waters, or any part thereof, for any purpose, public or private, otherwise than by license revokable by said city at pleasure, upon notice not to exceed six months, provided that this provision shall not be construed to prevent the appointing, sale and distribution of the said waters to the inhabitants of the city, or persons doing business therein, for irrigating and domestic uses, and for manufacturing purposes other than for water power."

"Sec. 192. The said corporation shall have the right and power to construct, maintain and operate water works, flumes, reservoirs, ditches, canals and other means to conduct the said waters from the said river, at all points between the said terminii, and to supply the city and its inhabitants with water, and to distribute such water, either in zanjas, pipes or otherwise, into, upon and over the lands within the limits of said city. All water mains, by whomsoever hereafter laid in said city, shall be of such material and of such capacity as shall be prescribed by ordinance, provided that no such main shall hereafter be laid in said city of less dimensions than four inches in diameter."

Section 193 relates simply to the rates of compensation for the use of water, and is not material here. It will be noticed that in this article and in this charter, there is no reservation of any rights of anybody, nor any recognition of the possibility of the existence of such right, but there is an attempt made in the charter to declare, and so far as it can, to vest in the City of Los Angeles the absolute, exclusive and unlimited right of the city to the waters of the Los Angeles river, and the exclusive right to the development, as the phrase goes, of the waters beneath its bed.

Upon these Mexican grants, the confirmation by the United States, and the patents issued thereon, and the said deeds and contracts, and documents claimed to be taken from the archives, the said statutes and judgments hereinbefore referred to, and the laws of Mexico and of the United States, the title of the respective par-

ties depended, and the question whether or not the city had any such paramount right as is here claimed, arises therefrom.

Sixth. The sixth question, namely, whether such prior or paramount right of the city, if it does exist, extends to the uses of the waters of the Los Angeles river for maintaining public parks and fresh water lakes therein, or any other purpose than for irrigation and domestic use, arose out of the same facts which were stated under the last question, with further facts as to the use now made of the water, which will be set forth under the next question.

Seventh. The seventh question, namely, as to whether this paramount right of the city, if it exists, extends beyond the limits of the pueblo, arises inpart out of the facts already stated, and the following further facts:

Under the provisions of the various acts of the legislature hereinbefore set forth, it was a conceded fact that the boundaries of the City of Los Angeles had been very considerably extended beyond the patent limits, prior to the commencement of this action; that until a short time before the commencement of the suit, the northern patent boundary differed from the northern charter boundary by only a small extent. The patent boundary made a point down at the confluence of the arroyo seco and the Los Angeles river, and cut out a triangle, while the charter boundary ran straight across east and west (trans. p. 117, fol. 153). There was, at the time of the commencement of the suit, no difference between the charter boundary on the west and the patent boundary (id. fol. 153). It was shown that the south boundary of the city had been extended about 1200 feet south of the patent boundary, and clear across the south patent boundary (id. fol. 153).

It was stipulated that the boundaries of the city had recently been extended on the north so as to take in the Highland Park country, and that an election had been called to extend the boundaries to the south, and Mr. Eaton, who had been several times

the city engineer, and had lived in the city from the time of his birth, said that he was acquainted with the territory south and west of the city known as Vernon and University, Pico Heights and Harper Tract, and that this was the territory which the election was called to annex to the City of Los Angeles; that he had made an estimate of the population in said districts, and would say there were about nine or ten thousand people there (trans. pp. 119-120, fols. 156-157).

It was stipulated that the population of the city, exclusive of this proposed extension, was seventy-five thousand (trans. p. 118, fol. 154).

It was also testified, and not contradicted, that the city makes a large use of the water for parks, which water comes from the main supply ditch, which ditch takes the water from the Los Angeles river; that the first park laid off in the city was the Sixth Street Park, now called Central Park; that was in 1886, and the pipe was laid from the Toberman reservoir, supplied from the Woolen Mills ditch, a branch of the main supply ditch; the next park laid off was East Los Angeles, supplied from the East Side branch of the main supply ditch; the next park was the Westlake Park, supplied from the Woollen Mills ditch; and all of these have been made since 1886; and the city was the owner of another park on Boyle Heights, Hollenbeck Park, supplied from the East Side ditch. There was also the park known as Elysian Park, but the witness thought no water was taken from the river for the supply of that park (trans. pp. 118-119, fol. 155).

When the witness first had knowledge of the water works of the Los Angeles City Water Company, in 1871, the amount of water diverted and used by the people of the city was about 700,000 gallons daily, which was in the neighborhood of 50 or 55 inches under a 4-inch pressure; that the amount of water now diverted by the City Water Company for the same purpose, is about 10,000,000 gallons daily, or about 800 inches under a 4-inch pressure, and this was under a contract with the city (trans. pp.

115-116, fols. 150-151). And there were now used in the city, altogether, about 3750 inches, measured under a 4-inch pressure, or 75 cubic feet per second (id. p. 118, fols. 154-155).

The water used for the parks comes from the river, and through the city's conduits. In the East Los Angeles Park there is a fresh water lake, and so there is in the Westlake Park, and in the Hollenbeck Park, all supplied from the waters of the river (trans. pp. 318-319, fols. 479-482).

Without further statement of the facts in regard to this matter, it is sufficient to say that large extensions had been made to the City of Los Angeles, occupied by a considerable number of people, and proceedings had been instituted, and election called under the laws of the State of California, for still further extensions; that in addition to the extensions in the boundaries, and population within those extensions, and the various uses for which they were supplied, there were also these parks, three of which had fresh water lakes in them upon which pleasure boats, both row boats and sailing craft, were kept for the amusement of the public. And the water for these parks was supplied by diversions made from the Los Angeles river.

It was claimed by the defendant in error that the city had not only this prior paramount right to the use of the water of the Los Angeles river and of the subterranean waters, but that such right extended to all of the said uses made of the said waters by the City of Los Angeles outside of the patent limits of the city, as well as within those limits, and would expand with the expansion of the boundaries of the city in the future. And the jury were instructed in accordance with this claim, as will hereafter be more fully shown.

Eighth. The eighth question, namely, as to plaintiff's ownership in the land sought to be condemned, claimed by the plaintiffs in error under the said Mexican grants, confirmed by the United States, and the patents issued by that government in pursuance of that confirmation, arises out of the said patents, deeds, statutes

and other documents which have hereinbefore been more particularly referred to, and the claim of the plaintiffs in error that under the said documents, constituing their chain of title to the said lands they acquired, as an incident to or part and parcel of the said lands as the effect of said patents and deeds, the title to the said percolating waters.

Ninth. The ninth question, namely, of whether the plaintiffs in error can be deprived of these percolating waters part and parcel of the thing granted by the grants of the Mexican government and patents of the United States, by the mere judicial definition of terms, arose in the following manner:

The title to the said percolating waters as part and parcel of the lands granted by the Mexican government and patented by the United States, was claimed by the plaintiffs in error, and this claim was apparently conceded by an instruction given by the Superior Court of Los Angeles county, to the jury wherein they were in substance instructed that the defendants did own the percolating waters, but subsequently and by other instructions which will hereinafter be set forth, the court gave such definitions and descriptions of percolating waters and underground streams as to practically exclude the possibility of there being any such thing as percolating waters, as that term had been known and understood and defined theretofore, and substantially took away from the jury all consideration of the question of whether the waters were percolating in the said lands, or the amount thereof, by such definitions and descriptions as excluded the waters shown to be percolating in the said soil, from the category of percolating waters.

Tenth. The tenth question arises under the same facts and instructions to the jury hereinafter set forth, and which instructions did, in effect, inform the jury that those percolating waters which were the sole property of the plaintiffs in error, vested in them under the said Mexican grants and United States patents and deeds, were not their property and were not to be taken into con-

sideration by the jury in fixing the compensation, and as a matter of fact, they were not taken into such consideration, and the plaintiffs in error were thereby deprived of their property without due process of law, because the said property was taken for a public use without just or any compensation.

Eleventh. The eleventh question arose in the following manner: The acts of the legislature of the State of California referred to in the said eleventh question, and already sufficiently set forth herein, were offered in evidence by the defendant in error, and against the objection of the plaintiffs in error were admitted by the court in evidence and for the purpose, as stated by the court, of showing a transfer of the pueblo rights of the Mexican pueblo to its successor, the City of Los Angeles, and which acts of the legislature undertook to vest the City of Los Angeles with, or to declare its ownership of, the paramount right to the use of the waters of the Los Angeles river and to the said waters percolating in its bed (Tr. fol. 309; fol. 464-465); and furthermore the bed of the river under the instructions of the Superior Court of the County of Los Angeles, approved by the Supreme Court, did, in effect, make the said bed of the Los Angeles river co-extensive with the San Fernando valley and basin, and the plaintiffs in error claim that the acts of the legislature referred to, as construed by the said Supreme Court, were, and each of them is, a law impairing the obligation of the contract contained in the Spanish and Mexican grants and the United States patents and deeds under which plaintiffs in error claim title to the said property.

Twelfth. Under the same acts of the legislature, grants, patents and deeds, and the constructions of the court of said acts of the legislature, and the definitions of underground streams and of percolating waters and of the bed of the river as contained in the instructions hereinafter set forth, the effect of the said acts of the legislature as construed by the court in this cause, do deprive the plaintiffs in error of their property without due process of law.

Thirteenth. The thirteenth question arises out of the said

grants, patents, statutes, and deeds, containing the title to the property in controversy, and of the instructions of the court to the jury before referred to, and hereinafter set out, and which instructions are claimed by the plaintiffs in error to be incorrect as statements of law, and incorrect in the definitions of percolating waters, underground water courses, and the bed of the stream, and that they did operate to withdraw from the consideration of the jury the compensation to be paid for the waters percolating in the said soil and of the rights of the plaintiffs in error in the waters of the Los Angelse river, as well as the percolating waters, and which constituted the chief value of the property of the defendants, sought to be condemned, and did thereby take the defendants' property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Fourteenth. The fourteenth question arose out of the facts hereinbefore stated, and the instructions of the court hereinbefore set out, by which the jury were directed that the compensation to be awarded to the plaintiffs in error for the property taken should be the market value at the date of the issuance of the summons, and which instructions did also exclude any value which the property might be known to have at the time of the trial, provided that value was the result of discoveries made or further information obtained concerning the property since the date of the issuance of the summons, and the plaintiffs in error claim that these instructions did result in taking the defendants' property without just compensation, and therfeore did deprive them of their property without due process of law, in violation of the said provisions of the Constitution of the United States.

The trial of this cause was carried on to its conclusion under the procedure which we have hereinbefore mentioned, and upon the said theories hereinabove outlined, and was submitted to the jury under instructions in accordance with those theories, and resulted in a verdict of the jury by which the plaintiffs in error were

awarded $23,000 for the land taken, and $2,000 damages to the lands not taken, and which verdict was followed by a judgment of condemnation in accordance therewith.

And on the 2nd day of April, 1896, the findings of the court were filed and the judgment of condemnation entered. The verdict, findings and judgment are set forth in the transcript, pages 58-62, folios 56-63.

A motion was made for a new trial of the cause, and on the 25th day of March, 1897, the motion for a new trial was denied (trans. pp. 686-687, fol. 1080).

The plaintiffs in error, on the 29th day of May, 1896, appealed to the Supreme Court of the State of California, from the judgment made and entered in this cause (trans. pp. 69-70, fols. 75-76), and on the 27th day of March, 1897, the plaintiffs in error appealed to the Supreme Court of the State of California from the order made on the 25th of March, 1897, denying their motion for a new trial.

The cause was heard in the Supreme Court of the State of California, and on the 3rd day of June, 1899, the decision of that court was filed affirming the judgment and order denying the new trial. The leading opinion of the court, if such it may be called, delivered by the Honorable Chief Justice, will be found in the transcript, pages 689-722, and the opinion delivered by His Honor, Mr. Justice Temple, concurred in by four other Justices of the court, is set forth, transcript, pages 722-724.

The plaintiffs in error filed a petition for a rehearing of the cause, set forth in the transcript, pages 725-783; and on July 3, 1899, the Supreme Court of the State of California denied the rehearing (trans. p. 783, fol. 1227). And the remittitur issued on July 5, 1899 (trans. p. 783, fol. 1228). The plaintiffs in error petitioned the Hon. William H. Beatty, Chief Justice of the Supreme Court of the State of California for writ of error, (trans. pp. 784-805), which writ was allowed on the 24th day of June, 1901 (trans. p. 820, fol. 1292), and was issued on the 27th of June,

1901, and lodged in the office of the clerk of the Supreme Court of California on the said 27th day of June, 1891 (trans. pp. 1-2), and the citation was issued on the 27th of June, 1901, and served on the 29th of June, 1901, (trans. p. 823). The assignment of errors is set forth (trans. pp. 805-819).

The order fixing the amount of bond was made the 27th of June (trans. p .821, fol. 1296), and the certificate given by the Honorable Chief Justice sets forth the fact that within 20 days after the filing of the judgment of the Supreme Court the defendants (plaintiffs in error) filed in said court their petition presented to said court for a re-hearing in said cause, and said petition was considered and acted upon by the said Supreme Court of the State of California, and on the 3rd day of July, 1899, said petition for a rehearing was by said court denied, and thereupon said judgment became final, and remittitur was issued thereon; and that the rules and practice of the court provided and required that where cases are heard and determined in bank without being allotted to, or heard or determined in department, a remittitur should issue within thirty days after the final judgment, and either party might petition the court for a rehearing within twenty days after such filing (trans. pp. 820-821, fol. 1294).

ASSIGNMENT OF ERRORS.

The plaintiffs in error now specify the particular errors asserted and intended to be urged upon the hearing.

1. The court erred in sustaining and affirming the order of the Superior Court of the County of Los Angeles, overruling the demurrer to the third amended complaint, in which said demurrer it was alleged, among other things, that several causes of action were improperly united in the said third amended complaint, in that a cause of action to determining rights in the waters of the Los Angeles river and the waters percolating beneath its bed claimed to be owned by the plaintiff, which claim was controverted by the defendants, was improperly united with an action to condemn, for public use, property admitted to be owned by the defendants.

2. The court erred in sustaining and affirming the order of the said Superior Court of Los Angeles denying the motion of the plaintiffs in error to stay the proceedings in this cause until the rights of the parties in the lands sought to be condemned, and in the waters of the Los Angeles river and the waters flowing beneath the surface in the bed thereof along the lands of the defendants, and in the waters percolating in the soil of said lands, had been finally determined by a court of competent jurisdiction, and in thereby sustaining and affirming the proceedings in the said Superior Court by which the plaintiffs in error were compelled to litigate the questions raised in the pleadings, of their rights to and in the property sought to be condemned in the same proceeding and at the same time the amount of compensation to be paid the plaintiffs in error for such interests in the property as they might be adjudged to have, was being litigated before a jury.

3. The court erred in sustaining and affirming the verdict of the jury determining the compensation to be paid to the plaintiffs in error for the property taken and the damages to the portion of the lands not taken, and in sustaining and affirming the judgment of the Superior Court entered thereon, notwithstanding that the said verdict determining the amount of compensation and damages was given before the said Superior Court had determined the controversy concerning the interest and estate of the defendants in said property for which compensation was to be made and damages awarded.

4. The court erred in affirming the action of the Superior Court in giving to the jury the instructions numbered XXV, XXVI, XXVII, XXVIII and XXIX, hereinbefore set out in full, and wherein the jury were instructed that the market value of the land at the date of the issuance of the summons was the measure of compensation to be made to the plaintiffs in error for the lands taken, and that they were to consider the elements of value as bearing on the question only so far as it might appear that they affected the actual market value at the date of the summons, which

actual market value was the thing which they were to determine, and that although they might believe from the evidence that by reason of things done, discovered or ascertained since June 27, 1893, (the date of the issuance of the summons) it now appeared that the land was then more valuable for any purpose or use than it was then known to be, still they could not consider such additional value unless they believed that those things were sufficiently known or obvious in June, 1893, to affect the market value at that time, and did so affect it, and that if they found that any of the underground waters of the land sought to be condemned were not a part of the waters of the Los Angeles river, they could consider that fact in fixing compensation only so far as it tended, if at all, to affect the actual market value of the land at the date of issuing the summons, disregarding any acts done upon the lands, or information acquired concerning the waters since that date; and that they were entitled to consider the evidence regarding the quantity of subterranean waters in the lands in question, and their value, only in arriving at a just determination of the market value of the land sought to be condemned on the 27th day of June, 1893, and therefore, if they believed that said waters did not give said lands an additional market value at that date, or if any additional market value were given, but the same did not equal the real value of said waters, then they must place on said lands a valuation equal only to the market value which said waters gave to said lands, irrespective of the true value of said waters, and that if said lands could not have been sold in the market on said date, the owners having abundant time to find a purchaser, for more than a certain sum, then they must not find the value of said lands to be greater than said sum, although in fact they might believe that the waters in said lands are worth more than that sum.

And the said Supreme Court of the State of California erred in upholding and affirming the said instructions in this, that the jury were thereby instructed that under the provisions of section

1249 of the Code of Civil Procedure of the State of California, the plaintiffs in error were not entitled to be paid for the said lands taken the actual value of the said lands at the date of the summons, or at any time, but only to be paid the amount which, in their opinion, the lands would have brought in the market under the conditions stated, although at the time of the trial it were well known and clearly proven that the value of the said lands was vastly greatler than the said market value at the time of the issuance of the summons. And said instructions did, in effect, direct the jury that the property of the plaintiffs in error might be taken for a public use without the payment of a just compensation therefor.

5. The court erred in deciding that the statute of the State of California, to-wit, section 1249 of the Code of Civil Procedure of said state, which assumed to authorize the taking of the said property for a public use without the payment of its actual value or just compensation, was valid and not in conflict with the provision of the Fourteenth Amendment to the Constitution of the United States prohibiting any state from depriving any person of his property without due process of law.

6. The court erred in approving and affirming the instructions given by the Superior Court to the jury in this cause, to the effect that the City of Los Angeles had the right to all the waters of the Los Angeles river necessary to give an ample supply for the use of its inhabitants, and for all municipal uses and purposes for which the city might require water, which right would increase in the future as the needs might increase, and that this right was paramount and superior to the rights of the plaintiffs in error in the waters of the river, and that though the said plaintiffs in error were the owners of an estate in fee simple in the lands sought to be condemned, and the Los Angeles river ran through them, yet they had no right to so use or divert the waters of the river as to diminish the same so that it would not furnish the amount needed for the supply of the city aforesaid, but that in determining

the value of the land to be taken, and the value of the land for which defendants are entitled to compensation, this paramount right of the city should be considered and the rights of the plaintiffs in error so to be valued were subject to the rights of the city as therein stated, which said instructions are part of instruction 1, and instructions 2, 3, 4 and 5, and are as follows:

The part of instruction 1 is as follows:

"The only question you are to decide is the amount of compensation which the defendants are entitled to before their estate and interest in the land can be taken as proposed."

"2.

"This compensation is to be composed of two parts or elements; first, the value of the interest and estate of the defendants in the land described in the complaint; second, the amount of the damages which will accrue to the other land of the defendants, which is a part of the same parcel as the land to be taken, by reason of the severance of the land to be condemned, and the construction of the works thereon, as proposed by the plaintiff. For the purpose of assessing this compensation and damages the right is deemed to have accrued at the date of the summons, which was June 27, 1893, and the actual value at that date is the measure of value for all property taken and the basis of damages for all property injuriously affected.

"3.

"The defendants' estate in the lands in controversy is an estate in fee simple, but it is subject to the rights of the city of Los Angeles in the waters of the Los Angeles river. This river flows through the land to be condemned. If the city of Los Angeles had no interest in the river waters, then the defendants would have all the rights of the riparian proprietors in those waters. As it is, their rights as riparian proprietors are impaired and diminished to the extent that the rights of the city affect those rights.

"4.

"The City of Los Angeles is situated on the river below these lands and is the owner of the right to take from the Los Angeles river all the water that is reasonably necessary to give an ample supply for the use of its inhabitants, and for all municipal uses and purposes for which the city may require water. This right is measured by the necessity and if the needs increase in the future, the rights will expand to include all that the needs require. This right of the city is paramount and superior to the rights of the defendants in the waters of the river.

"5.

"The defendants, therefore, have no right to so use or divert the water of the river as to diminish the same so that it will not furnish the amount needed for the supply of the city aforesaid, and in determining the value of the land to be taken, this fact must be considered, and the value of the land for which the defendants are entitled to compensation, is its value, subject to the above stated right of the city."

Transcript, pp. 643-644, fols. 1009, 1010.

7. The court erred in deciding that the defendant in error had the paramount right to the use of the waters of the Los Angeles river for supplying the inhabitants of the city, and the city with water for municipal purposes outside of the pueblo limits and outside the boundaries of the land patented to the city by the United States.

8. The court erred in deciding that the city had such paramount right to the use of the water for supplying the parks in the City of Los Angeles and the lakes therein, sprinkling the streets, and for manufacturing purposes.

9. The court erred in its decision approving, affirming and upholding the instructions and each of them given by the said Superior Court of the County of Los Angeles, numbered 12, 14, 15, 16, 17, 18 and 20, and which were as follows:

"12.

"In addition to these rights and benefits arising from the flow of the river through this land, the defendants are the absolute owners of all such water as may be present in the soil of this land, and which does not constitute a part of the water of the river. This is usually called percolating water. There is, however, no magic in the word 'percolating,' and the fact that any witness may apply that word or refuse to apply it to any particular class of waters of which he may speak is not conclusive of the question whether or not such water does or does not form part of the river. That question is to be determined by you from a consideration of the facts proven. The right and ownership of the defendants in this class of water is distinct from and much greater than their right to the waters of the stream. As to the waters of the stream, they have a right only to the use of it on this land; and they do not own its corpus, its body or the very water itself, and they have no right to take it away from the land and use it on

other lands, or to sell or dispose of it for use on other lands or at other places. But as to this other water, if any there be, in this land, not a part of the stream, they are the absolute owners of it, to the same extent and as fully as they own the soil, or the rocks or timber on the land. Therefore, if, by any means, they can separate this water from the land, they have an absolute right to the water thus separated, and may conduct it away and sell or dispose of it anywhere, as they see fit, subject only to the limitation that they may not excavate or do anything on the land for the mere purpose of intercepting such water and preventing it from flowing into the stream or water-course on the land of another, and without intending to make any beneficial use of it themselves. Whatever additional market value this land may have had by reason of the presence therein of water of this class, or by reason of the feasibility of separating it from the land or of using it on the land, or of conducting it to some other place for use or sale, or of the great market value of such water for such purposes, or by reason of all these things combined, or by reason of any other lawful benefit or advantage which this water gives, this additional market value inures to the benefit of the defendants, and is a part of the compensation to which they are entitled in this case as the value of the land to be condemned."

"14.

"The Los Angeles river is composed of its main stream and any branches it may have, whether surface or subterranean."

"15.

"While a water-course must have a bed and banks or sides, yet such bed may consist of any material which keeps the waters from penetrating below a certain depth, and such banks or sides may consist of any material which has the effect of confining the waters within circumscribed limits.

"16.

"It does not always follow that water which does not flow on the surface in a visible stream is, for that reason, not a water-course, or not a part of the water of a stream which does at some place run on the surface; nor need it flow in a defined channel under ground as a solid body of moving water of any particular dimensions in order to constitute a water-course.

"If you find from the evidence that there is a bed or river bottom filled to a considerable depth with sand, gravel or other porous material, meandering over which a stream runs on the surface and through and in which the water moves under ground, enough of it rising to the surface to supply the surface stream, and the other portions of the underground water moving with a much less velocity than the surface stream, and through a wider or larger space in and through the interstices of the porous material, but in the

same general direction as the surface stream and in connection with it, and in a course and within a space reasonably well defined, the conditions being such that the existence and general direction of the body, the body of water moving under ground, can be determined with reasonable accuracy, then that portion of the water thus moving under ground should be considered as a part of the water-course as well as that part which flows over the surface.

"If such a water-course exists, it is immaterial, so far as the water-course is concerned from or through what lands" the waters flow in reaching the channel or whether they reach the same by percolation or by clearly defined streams.

"17.

"So, also, if you find that the water coming down on the surface in the streams known as the Tejunga, Little Tejunga and Pacoima creeks, in the northeastern portion of the watershed it is discharged on the plain known as the San Fernando basin, and there sinks in the sand washes and flows down southwardly under ground through sand, gravel or other material easily permeable by water and along the courses and its channels which have been made by the streams of water from those same creeks flowing on the surface, but which channels were long ago filled up with this porous material; that these waters now flow in these channels beneath the surface to the land in controversy; that on this land there is a range of hills extending easterly and westerly, so as to change the course of these underground channels, and combine or collect the water into one general body of water, and force the same to turn and move eastwardly in a similar channel through these lands and on down along the general course of the Los Angeles river. That upon arriving at this land a portion of the water rises to the surface and flows above ground as the Los Angeles river, and the remainder flows under ground along the same general direction, and in connection with the surface stream, in porous material formerly deposited by the same stream in its bed, then all this body of water, both above and below the ground should be deemed a part of the same stream from its sources to its outlet.

"18.

"If the jury find that on the lands sought to be condemned there is situated the river bottom of the Los Angeles river extending the whole length of said land, and occupying nearly the whole thereof, and containing all the subterranean waters of said land, and filled to a considerable depth with permeable material, consisting of loam, sand, gravel and boulders, mixed together and interspersed with irregular and broken strata, masses or pockets of clay, and cemented sand or gravel lying in place substantially

as deposited by the forces of nature; and that as the same lies in place the natural voids or interstices of such material generally throughout the whole of said river bottom are equal to from one-fifth to one-third of the entire mass; and that the subterranean waters in said lands enter the same chiefly from the north and partly from the west sides thereof from lands composed of substantially the same materials as the lands sought to be condemned said waters so entering under pressure caused by gravity; and that the south boundary of said river bottom is formed of an impermeable dyke of rock known as the Cahuenga hills; and said waters entering from said north side are prevented from continuing their flow to the south, and are dammed up by said wall of rock, and that all of the subterranean waters in said river bottom are thereby forced to fill all of the said interstices and void places in the material of which said river bottom is composed to a height in some places equal to and in some places greater than the level of the surface stream of the river; and that there are no impenetrable and continuous barriers extending through the said mass in said river bottom in any direction so as to interrupt and prevent the substantial continuity and contact of all of said subterranean waters; and that some of said subterranean waters to the amount of about 1000 miners' inches, constant flow, measured under a four-inch pressure, being so brought to the surface, enter into and form part of the surface stream of the Los Angeles river on said lands, so that the amount of said surface flow at the point where the same leaves said land on the east is increased by about 1,000 inches over the amount of its surface flow at the point where it enters said land on the west; and that the remainder of said subterranean waters move under ground to the east although with a varying velocity and much slower than the said surface stream, but in the same general direction with it, off of the lands sought to be condemned, still continuing in and through the river bottom of the Los Angeles river, which is composed of like permeable material as aforesaid, and bounded and confined on the southerly, and as it turns to the south, on the westerly side thereof by the same continuous dyke of rock, said waters still maintaining their substantial continuity; and that part of said waters rise from time to time as they flow in said river bottom and feed the surface flow of said river; and the remainder of said waters continue to move under ground in said river bottom as aforesaid; and that said waters continue to move in that manner for several miles after leaving the lands sought to be condemned, and until said river bottom enters within the limits of the City of Los Angeles, crossing its northern boundary, then the jury must find that all of the subterranean waters contained in the land sought to be condemned, are a part of the waters of the Los Angeles river."

"20.

"If you find from the evidence that the lands sought to be condemned are situated at the lower portion of and form a part of the San Fernando basin, or watershed, near or at its outlet, and that said basin is about 24 miles long and about 12 miles wide at the widest point; and that said outlet is from two thousand feet to three miles wide, and bounded and defined on the southern side by the rock of the Cahuenga range and on its northern side by similar rock of the Verdugo hills, and that the earth of which the basin is generally composed, including said outlet and the land sought to be condemned is an alluvial or other deposit made up of loam, sand, gravel and boulders mixed together and interspersed with broken or irregular strata or masses of clay or cemented sand and gravel and lying in place as originally deposited by the forces of nature, and that as the same lies in place, the natural voids or interstices of such earth, generally throughout the basin, including the defendants' lands and said outlet, are equal to from one-fifth to one-third of the bulk of the entire mass, and that such entire deposit lies upon a grade or slope toward and through the outlet of such basin and that all the water falling in the watershed of said basin which is not lost in storm run-off or by evaporation or in supporting plant life, or held immovable in the ground, sinks into the earth composing such basin and thence by force of gravity moves down through such voids or natural interstices of the earth throughout the greater portion of the entire mass, to the outlet of the basin, through which it passes, without forming anywhere in the mass any definite course or channel which it can be ascertained with reasonable accuracy that such water is moving in greater quantities or with greater velocity than in other places, so as to be concentrated in a stream either above or below ground, then such waters so moving through such outlet, or through or in defendants' land in the natural voids or interstices of the earth, do not constitute a subterranean flowing stream or water-course, but they belong to the owner of the soil in which they may be found, and the portions of them which may be found in the land of the defendants are the property of the defendants. But if such waters does collect under ground and flow in certain courses or channels through coarse, permeable material therein, where the existence and general course of the flowing or moving body of water can be easily determined, then the water so moving in such channels would constitute a water-course, although not visible on the surface and although the space through which the channel extends may be largely filled with the material through which the water flows.

"The burden of proving that waters moving in the ground are

flowing in a natural water-course, or in a defined channel, or are a part of a stream, is upon the plaintiff in this action. The presumption is that they are not part of a stream or water-course nor flowing in a definite channel."

Trans. pp. 645-650, fols. 1012-1020.

in this, that said instructions undertook to instruct the jury as to what constitutes percolating water, and that under the descriptions, definitions and illustrations therein contained, the jury were, in substance, instructed that there were no percolating waters in the said land sought to be condemned, and that said instructions are erroneous in that they do not contain a correct definition, description or explanation of the term "percolating waters," and the effect of them was to exclude from the consideration of the jury and the estimation of the compensation to be paid to the plaintiffs in error, that portion of the property of the plaintiffs in error which constituted almost its entire value. And furthermore, there was no evidence in the case warranting the said instructions, or warranting the jury in finding that the waters as described in the evidence were not percolating waters, and belonged to the plaintiffs in error.

10. The court erred in deciding that the said waters were not percolating waters, and did not belong to the plaintiffs in error as owners of the said property sought to be condemned, holding the same under the title vested by the said Mexican grants and United States patents, and under which the said plaintiff in error claimed and held title to the said property.

11. The court erred in deciding that the city of Los Angeles, either as the successor of the Spanish pueblo or otherwise, was the owner of the prior and paramount right to the use of the said waters under the acts of the legislature of the State of California hereinbefore set forth.

12. The court erred in deciding that the said acts of the legislature attempting to vest the city of Los Angeles with the title to all of the said waters, and which statutes are hereinbefore set forth, were valid and did not impair the obligations of the con-

tracts contained in the said Spanish and Mexican grants and United States patents under which the plaintiffs in error claim, and did not deprive the plaintiffs in error of their property without due process of law.

13. The court erred in deciding that said defendant in error was entitled to take the property of the plaintiffs in error for the public uses aforesaid without making any compensation for the value which the said land possessed for the waters percolating therein.

14. The court erred in deciding that said defendant in error was entitled to take the lands of the plaintiffs in error in said action for the said public uses without making compensation for the value of the said lands, with the rights of a riparian owner included therein, and in deciding that the said plaintiffs in error were not entitled to such riparian rights.

15. The court erred in deciding that the plaintiffs in error were not entitled under and by the Fourteenth Amendment of the Constitution of the United States to just compensation as a condition to the taking of their property for the public use.

16. The court erred in deciding that the statutes of the State of California purporting to authorize, or attempting to clothe the jury with the power in condemnation proceedings to determine both the property to be condemned, the right, title and interest and estate of the defendants therein, and also at the same time to determine the compensation to be paid therefor, were valid.

17. The court erred in upholding the validity of the authority exercised by the said Superior Court of the County of Los Angeles in taking the property of the said plaintiffs in error in the manner aforesaid, and in deciding that the said proceedings were not repugnant to the Fourteenth Amendment to the Constitution of the United States, and void. And in deciding that the said proceedings did not deny to plaintiffs in error the equal protection of the laws.

18. The court erred in deciding that the entire San Fernando

valley along the lands of the plaintiffs in error was, throughout its entire breadth from one mountain to the other, the bed of the Los Angeles river, and that the City of Los Angeles was the owner of, and entitled to, the exclusive right to develop the percolating waters therein, and to take the same for its own use and that the plaintiffs in error had no rights therein.

Besides the questions involved in this cause which have already been stated, we are admonished that the defendant in error will also raise a question as to the jurisdiction of this court. Whether by motion to dismiss the writ for the want of jurisdiction, or whether the objection will be taken at the hearing, we are not fully advised, and for that reason we propose to discuss now the question of the jurisdiction of the court, and to answer, so far as we have been informed, the grounds upon which the want of jurisdiction is claimed, as well also as such other objections to the jurisdiction as we may be able to anticipate.

BRIEF OF THE ARGUMENT.

I.

THE COURT HAS JURISDICTION OF THIS CAUSE.

1. The first objection that has been suggested to the jurisdiction of this court by our adversaries, is that the writ of error was not sued out within two years after the decision. As already stated, the judgment of the Supreme Court of the State of California was filed June 3, 1899. (Trans. p. 689, fol. 1112). A petition for rehearing was filed June 20, 1899. (Trans. p. 725, fol 1127). The rehearing was denied July 3, 1899. (Trans. p. 783, fol. 1227). The writ of error was allowed the 24th of June, 1901. (Trans. p. 805, fol. 1265; p. 820, fol. 1292), and issued the 27th of June, 1901, (Trans. p. 1, fols. aa-bb), and a copy thereof was lodged in the office of the clerk of the Supreme Court of the State of California on the same day. (Trans. pp. 1-2). The citation was issued on the 27th of June, 1901, and served on the 29th of June, 1901. (Trans. p. 823, fol. 1301).

It will thus be seen that the writ of error was allowed, issued and a copy lodged with the clerk of the Supreme Court of California, the citation issued and served within two years after the denial of the petition for a rehearing, and the certificate of the chief justice of the Supreme Court of the State of California shows that the cause was heard and determined in bank, and was not allotted to, or heard or decided in, either of the departments; that the decision was rendered on the 3rd day of June, 1899; that the petition for rehearing was filed within twenty days after the filing of said judgment, and within the time prescribed by the rules and practice of the court, and that said petition was considered and acted upon and denied on the 3rd day of July, 1899. (Trans. pp. 820-821, fol. 1294).

It is a settled rule of this court that if a motion or petition for rehearing is made or presented in season, and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal.

Aspen Mining & Smelting Co. et al, appellants, vs. Margaret Billings et al., 150 U. S. 31; 37 L. Ed. 986, 988.

Slaughter House cases, 19 L. Ed. 915, 920.

Texas Pacific Ry. Co. vs. Murphy, 111 U. S. 488; 28 L. Ed. 492.

Northern P. R. Co. vs. Holmes, 155 U. S. 137; 39 L. Ed. 99.

2. It is claimed that no federal question is involved in this controversy. But this is a mistake. Many federal questions are involved and among them are the following:

The defendant in error, the City of Los Angeles, alleged in its complaint that "the plaintiff is, and ever since its organization has been, the owner in fee simple of the exclusive right to the use of all the waters of said river from its source to the scouthern boundary of said city, in trust for the public purposes of supplying the inhabitants of said city with water for domestic uses and of sup-

plying water for the irrigation of the irrigable lands embraced in the four square leagues of the pueblo lands of plaintiff, and for other municipal uses in said city." (Trans. p. 63, fols. 64-65, par. III of the complaint).

It was also alleged that the City of Los Angeles had taken measures to inaugurate and plan a system of, and intended to construct, water works by which to divert the waters of the river on the lands thereinafter described and sought to be condemned, and conduct the same to the city for the purpose of supplying the inhabitants of the city with water for domestic use, including the sprinkling of flower gardens and grass plots, and for the purpose of supplying water for the sprinkling of streets and parks, flushing of sewers, extinguishing of fires, and for other municipal uses in said city. (Trans. pp. 63--64, fol. 65, par. IV. of the complaint.)

It was further alleged, in the sixth paragraph of the complaint, that a large part of the city consists of hills so elevated as not to permit of the bringing of the water of said river thereon unless the same be taken from a point as high up on said river as said land; and that the water of said river could be conducted by gravity to nearly all said hilly portions of said city if diverted from said river on said lands; that the population of said city at the time of the commencement of this action was not less than seventy thousand, having increased to that number since the year 1880 from a population of less than twelve thousand inhabitants, and that said population is constantly increasing, and said city rapidly growing in extent of streets, parks, sewers and buildings, so that the amount of water needed to supply the inhabitants of said city for domestic purposes, including the sprinkling of flower gardens and grass plots, and to furnish water for the sprinkling of streets and parks, flushing of sewers and extinguishing of fires in said city is fast increasing to such an extent that at some time in the future all the water of said river within the boundaries of said land sought to be condemned may be needed for said purposes. . . . . That it will be necessary for the purposes

aforesaid for plaintiff to construct on said land sufficient collecting chambers, tunnels, filtration galleries, settling reservoirs or basins, submerged dams and other works to divert all of the waters of said river on said lands. (Trans. pp. 64-65, fols. 66-67, par. VI. of the complaint).

And it was further alleged that subject to said rights of plaintiff (the City of Los Angeles) to said waters of said Los Angeles river, the defendant J. D. Hooker was, at the time of, and after the commencement of this action, the owner in fee simple of the tract of land thereinbefore first described, and the defendant A. E. Pomeroy was, at the time of, and after, the commecnement of this action, the owner in fee simple of the tract of land secondly described, and that both of said tracts of land are required for the construction, operation and maintenance of said works so proposed to be constructed by the plaintiff thereon as aforesaid. (Trans. p. 67, fols. 70-71, par. VIII. of the complaint).

This ownership was denied by the plaintiffs in error, and they denied that the defendant in error, the City of Los Angeles, is, or ever had been, the owner in fee simple, or in any estate of the exclusive or any right to the use of all the waters of said river, either in trust for public purposes of supplying the inhabitants of said city with water for domestic uses, or for supplying water for irrigation of irrigable lands embraced in the four square leagues of pueblo lands of plaintiff, or for other uses in said city, or for any uses or purposes whatever, or that the city had any right in the said water, or rights to use the same other than as an appurtenant to said city as a riparian owner and rights acquired by appropriation and use thereof. And they denied that said right or use, either by appropriation or otherwise, had vested in the city, or that it now owns, the right to the use of the said waters of the Los Angeles river to the exclusion of these defendants; but they averred that the lands owned by them are riparian to the stream, and situated far above the north boundary of the City of Los Angeles, and above the point of diversion of said waters from the said river by the

said plaintiff, and that as such riparian owners they are entitled to the use of the waters of said river for all lawful purposes, and to a reasonable extent, upon said lands for irrigation, domestic and other uses. (Trans. p. 40, fols. 27-28, par. IV. of the answer.)

They also alleged the grant made the 23rd of March, 1843, by Manuel Micheltorena to Vicente de la Osa, of the tract known as the "Providencia" ranch. (Trans. p. 45, fols. 35-36).

The confirmation thereof on October 18, 1853, and the patent issued thereon on the 6th day of August, 1872, (Trans. pp. 128-130, fols. 171-175), and in the amendments to the answer set forth, the grant made by the same governor on the 5th day of March, 1843, to the Indian, Jose Miguel Triumfo, of the Cahuenga, the confirmation of it by the board of land commissioners on the 15th of November, 1853, and the issuance of the patent thereto August 2, 1872; and the grant of the San Rafael rancho October 20, 1784, the subsequent grant on the 12th day of January, 1798, approved by the commissioners, and the patent issued by the United States on the 28th of January, 1882. (Trans. pp. 47-48, fols. 39-40).

And these allegations of the answer were proven by the introduction of the patents, the patent for the San Rafael grant being found at pages 122-125, fols. 161-165; the patent for the Cahuenga, pages 125-128, fols. 166-170; and the patent for the Providencia, pages 128-130, folios 170-175).

These patents are all in the same form, and in the usual form of patents issued upon the confirmed Mexican grants, which, after the recitals and the return of the surveyor with the description of the property, there follows:

"Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the act of congress aforesaid of third March Anno Domini 1851, and legislation supplementary thereto, have given and granted, and by these presents do give and grant unto the said Julio Verdugo and Catalina Verdugo, their heirs and assigns, the tract of land embraced

and described in the foregoing survey, but with the stipulation that in virtue of the Fifteenth section of said Act, neither the confirmation of this said claim, nor its patent shall affect the interest of third persons; to have and to hold the said tract with the appurtenances, unto the said Julio Verdugo and Catalina Verdugo, their heirs and assigns forever with the stipulation aforesaid." Trans. pp. 124-125, fol. 165.

The other patents are in exactly the same form, with the exception of the patent to the Providencia. The difference in that patent, however, not in any manner affecting the question here. In that patent there was expressly excepted the tract called "Cahuenga," containing 388 acres and 34-100 of an acre, designated upon the plats, etc., which has been finally confirmed to D. W. Alexander and others, and which is the same tract contained in the patent of the Cahuenga. As we have before stated, the plaintiffs in error claimed title to this property under and through those patents, and besides the patents, a large number of deeds, wills and judicial decrees were introduced which constituted the plaintiffs in error's chains of title, and in the bill of exceptions it is stated and certified and allowed by the judge of the court, that in the deeds of conveyance and instruments in the said list contained, there were no reservations or limitations upon the title conveyed except as herein otherwise stated. The deeds were in the ordinary form, purporting to convey the fee simple of the property; that so much of the patents were set out in the bill of exceptions as were material to the cause, and also that the defendants claimed the property in controversy and the whole of the Pomeroy and Hooker tract under said patents from the United States Government of the said three ranches. (Trans. pp. 320-322, fols. 483-488).

It was further alleged in the amendment to the answer that the said lands described in the said amended complaint were contained within the patent boundaries of these ranchos, and that the defendants (the plaintiffs in error) are now the owners of the said tracts of land described in the plaintiff's amended complaint herein, in fee simple, claiming the title thereto under and through the

aforesaid Mexican and Spanish grants, and under the proceedings in confirmation thereof, and under the patents issued by the United States founded thereon. This last averment is contained in paragraph XVI, substitued for the original paragraph XVI (trans. p. 48, fols. 40-41).

Then follows the allegation in paragraph XVII, that the Los Angeles river flows through the said land so owned and held by the defendants, and in paragraph XVIII the plaintiffs in error averred that as the owners of the said lands, they were also the owners of all the waters percolating in the soil thereof, and were also riparian owners having the rights of riparian proprietors in the said waters of the Los Angeles river (trans. p. 45, fol. 36).

In Packer vs. Bird, 137 U. S. 661, 34 L. Ed. 819, the question arose upon the construction of a patent of the United States concerning the descrpition of the property granted, and the question was whether the patent which described the eastern boundary of the land as commencing at a point on the river which was on the right and west bank, and running southerly on its margin, embraced the islands within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff was that the land granted and patented being bounded by the river, extends to the middle of the stream and thus includes the island. It did not appear from the record that the waters of the river at the point where the island was situated were affected by the tides, and it was assumed that such was not the case. The court, after saying that the test of navigable streams in English law, namely, that the waters must be affected by the tides, did not apply here, and after saying that they accepted the view of the Supreme Court of California in its opinion as expressing the law of that state, said that "The Sacramento river being navigable in fact, the title of the plaintiff extended no further than the edge of the stream. And they further say, "The courts of the United States will construe

grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use or enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream. It is therefore important to ascertain and determine what view will be taken by the courts of the United States in the construction of grants of the general government in conferring ownership when they embrace lands bordering on navigable waters above the influence of the tide. How far will such grants be deemed to extend into the water, if at all? From the conflicting decisions of the state courts cited, it is evident that there is no such general law on the subject as will be deemed to control their construction."

34 L. Ed. 821.

The court in that case did come to the same conclusion upon this subject that the Supreme Court of California did, from which court the case was brought on a writ of error, but nevertheless did distinctly decide that the courts of the United States would construe the grants of the general government without reference to the rules of construction adopted by the states for their grants, and they did take jurisdiction in that case, and thereby did hold that the question was a federal question.

In that case it was held that the lands below ordinary high-water mark belonged to the state. It is therefore obvious that in following the rules of the state in which the particular lands might be situated, with regard to the extent to which the grantee of lands bordering upon navigable waters would take, that is, whether it would extend to high water mark, or go to the middle of the stream, the court was accepting a state rule which affected the state's

own property, and that a patent from the United States wherein the land granted was bounded by a navigable stream would not vest the title to the middle of the stream unless the state law saw fit to give it that effect.

In French-Glenn Live Stock Company against Springer, decided April 7, 1902, (advance sheets of the Opinions of the Supreme Court No. 12, p. 563), the court said:

"As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of federal law is left open for our revision. However, as the plaintiff in error contended in the courts below, and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a federal question is thus presented." (pp. 565-566).

In Shively vs. Bowlby, 152 U. S. 1, 38 L. Ed. 331, the court, Mr. Justice Gray delivering the opinion, after saying that the case concerned the title in certain lands below high water mark in the Columbia river, in the State of Oregon, the defendant below now plaintiff in error, claiming under the United States, and the plaintiffs below now defendants in error claiming under the State of Oregon, and that Shively being the owner by title obtained from the United States under the act of Congress of September 27, 1850, of a tract of land in Astoria, bounded on the north by the Columbia river, had made a plat of it laying it out into blocks and streets, and including the adjoining lands below high water mark, etc., and of the plaintiffs afterwards obtaining from the State of Oregon deeds of conveyance of the tide lands in front of these blocks, and that they built and maintained a wharf upon part of them, and that the defendant, by counter-claim, asserted the title under a subsequent conveyance from Shively to some of the tide lands not included in his former deeds, but included in the deeds from the state, said:

"The counter-claim, therefore, depended upon the effect of the grant from the United Staes to Shively of land bounded by the Columbia river, and of the conveyance from Shively to the defendant, as against the deeds from the state to the pliantiffs. The Supreme Court of Oregon, affirming the judgment of the lower court

of the state, held the counter-claim to be invalid, and thereupon, in accordance with the state practice, gave leave to the plaintiffs to dismiss their complaint, without prejudice. The only matter adjudged was upon the counter-claim. The judgment against its validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the state, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a federal question within the appellate jurisdiction of this court. That jurisdiction has been repeatedly exercised, without objection or doubt, in similar cases of writs of error to the state courts."

38 L. Ed. 335.

In Washougal & L. Transportation Co. vs. The Dalles P. & A. Navigation Co., 68 Pac. Rep. 74, a case decided by the Supreme Court of Washington, Fullerton, Justice, delivering the opinion, said:

"What title or right passes under a grant of lands made by the United States is a federal question, and the judgment of a State Supreme Court thereon is within the appellate jurisdiction of the Federal Supreme Court (Shively vs. Bowlby, 152 U. S. 1). The judgment of that court on any question affecting the construction of such grants is, therefore, authoritative and binding upon the state courts."

68 Pac. Rep. 76-77.

The claim, therefore, here set up in the answer of the plaintiffs in error of the rights of a riparian owner, and the ownership of the percolating waters in these lands thus derived from the patent of the United States, as well as from the confirmed Mexican grants, presented a federal question, and the decision being against that right, this court has jurisdiction.

The principle for which we are here contending has been decided in innumerable cases. It is settled beyond controversy that the United States government is, as to the owners of lands through which innavigable streams flow, a riparian proprietor, and as such, entitled to all the rights attaching to the situation. That the waters of a runnig stream in the public lands of the United States are part and parcel of it, no state has any power to affect the in-

terests of the government as such riparian owner, nor can it disturb the rights of a grantee of the government except by the process of condemnation. We shall here merely call attention to a few of those cases, but shall consider this question more at length hereafter.

Howell vs. Johnson, 89 Fed. 556;
Mining Company vs. Ferris, Fed. Cases No 14,371;
Cruse vs. McCauley, 96 Fed. 369, 373-374;
Sturr vs. Beck, 133 U. S., 33 L. Ed. 761, 765-766.

3. Whether the statutes of this state prescribing the proceedings for the condemnation of private property for public use, having been construed in this case to authorize trial of the title to property at the same time, and in the same proceeding that its condemnation is sought, and authorizing a jury to determine that compensation before the rights of the property are determined, do provide for the taking of private property for public use without just compensation, and in violation of the Fourteenth Amendment to the Constitution of the United States, is a federal question.

4. Whether the statutes of California which do assume to vest the City of Los Angeles with a paramount and absolute right to the waters of the Los Angelse river, surface and subterranean, did deprive the plaintiffs in error of their property without due process of law, in violation of said Fourteenth Amendment to the Constitution of the United States, is a federal question.

5. Whether the proceedings in this case did result in taking the property of the plaintiffs in error without just compensation, is a federal question. This court has established the proposition that taking private property for a public use without just compensation does deprive the party of his property without due process of law.

Kaukauna Water Power Co. vs. Green Bay & Mississippi Canal Co., 142 U. S. 254; 35 L. Ed. 1004, 1009;
Chicago B. & Q. R. Co. vs. Chicago, 166 U. S. 226; 41 L. Ed. 979, 984.

6. THE PROTECTION OF THE CONSTITUTION OF THE UNITED STATES IS SUFFICIENTLY INVOKED.

We know that it has been held in many cases that the protection of the constitution must be specifically claimed, and the provision of the constitution which is supposed to afford that protection particularly pointed out, and that this claim must appear upon the record itself, and cannot be made to appear by anything outside of the record. But while such is the rule generally, it is by no means universal.

It has been held in many other cases that it is quite sufficient if it appear that the question did arise and was necessarily decided. In the case of Kaukauna Water Power Company against the Green Bay & Mississippi Canal Company, *supra*, Mr. Justice Brown, delivering the opinoin of the court said:

"The only question involved in this case proper for us to consider is, whether the act of the legislature of Wisconsin, of August 8, 1848, reserving to the state the water power created by the erection of the dam over the Fox river as construed by the Supreme Court of the state and the proceedings thereunder, operated to deprive the plaintiffs in error of their property without due process of law. Notwithstanding the inhibition of the constitution is not distinctly put in issue by the pleadings nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court."

35 L. Ed. 1009.

In Harris vs. Dennie, 3 Peters 289, 7 L. Ed. 683, 687, the court said:

"The objection is that this court has not jurisdiction of this case because it does not appear upon the record that any question within the purview of the 25th section arose in the state court upon the decision on the special verdict, but it has been often decided in this court that it is not necessary that it should appear, in terms, upon

the record that any such question was made. It is sufficient if, from the facts stated, such question must have arisen, and the judgment of the state court would not have been what it is if there had not been a misconstruction of some act of Congress, etc., etc., or decision against the validity of the right, title, privilege or exemption set up under it."

In Dewey vs. City of Des Moines, 173 U. S. 193; 43 L. Ed. 665, 667, Mr. Justice Peckham said:

"Although no particular form of words is necessary to be used in order that the federal question may be said to be involved within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the federal question as one that was relied on by the party, and then if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment, or that such was its necessary effect in law."

Now in this case, the plaintiffs in error did, by their answer, distinctly plead a title derived from the United States government, and they did claim that, as an incident to, and part and parcel of that title, and the effect of the patent issued by the United States, they were vested with the rights to the waters of the river Los Angeles and to the subterranean waters percolating through their lands. This, under all the authorities, was a sufficient claim of a right under the United States, to give this court jurisdiction on a writ of error from the state court when that right was denied.

Again, we objected to the introduction of the statutes of California offered in evidence by the defendant in error, upon the ground that they were incompetent, irrelevant, immaterial and unconstituional (trans. p. 309, fols. 464-465). These were the statutes which purported to vest in the City of Los Angeles the rights recited therein, and which have already been brought before the court. These statutes were public acts, and of them the courts took judicial notice, and jury as well. The introduction of the statutes in evidence, therfeore, was of no very great consequence in the case, since they would have been before the jury from this

judicial notice, and the plaintiffs in error, when they were thus brought to the attention of the jury, asked the court to instruct the jury as follows:

"One who owns the fee to lands owns from the surface to the center of the earth, and owns also the waters percolating in the soil from the surface to the center; and a patent from the United States government of lands included within a confirmed Mexican grant, and without reservations as to the estate conveyed, passes the title in fee simple, to the land, and no act of the legislature of the state can impair the grant, nor grant to another any rights in the property, and any attempt on the part of the legislature to create rights therein in another person is in violation of the constitution of the United States, and is void."

Which instruction the court refused as unnecessary (trans. p. 668, fol. 1050, instruction No. XXVIII).

The plaintiffs in error also, in the specification of errors, specified as one of those errors, the admission of these statutes in evidence (trans. p. 679, par. 3).

It is distinctly shown in the opinion of the Supreme Court of the State of California, that this controversy concerning the rights of the parties in these lands, under their respective titles, constituted the main controversy between them. Said the Honorable Chief Justice Beatty in delivering his opinion:

"The particular points in controversy between the parties are, *First*, as to the existence of a well-defined subterranean stream by which the waters or a large portion of the waters, resulting from the rainfall within the watershed of the San Fernando valley, are carried off between the Cahuenga range and the Verdugo hills; and, *Second*, as to the rights of the city of Los Angeles as the successor to the Mexican pueblo, in the waters of the Los Angeles river: The claim of the plaintiff is that the city has certain extensive rights in the stream, over and above those of the ordinary riparian owners, and that the stream itself consists, not only of the visible surface flow of the river, but of the subterranean flows, slowly passing through the boulders, gravel and sand, under and adjacent to, the river.

"Both of these claims are disputed by the defendants, and out of this controversy arise most of the points to be considered in disposing of the appeal." (Trans. p. 691).

The court then referred to the motion of the plaintiffs in error,

made before the commencement of the suit, to stay the proceedings until the determination of the other suits already referred to, and the motion to strike out the allegations of the complaint setting up the claim of the city to the waters of the stream, and contending that the city could not maintain a proceeding to condemn lands while asserting title in itself to that which constituted their chief value. And that these motions were denied and exceptions to the ruling thereon give rise, said the court, to the first point discussed in the brief.

The court then referred to the stipulation as to the manner in which the trial should procede, and that it was stipulated that the question of the title should be tried before the court without a jury; but let it be borne in mind that this stipulation was entered into after the court below had overruled all objections made to the court's proceeding in the case at all in any manner with these questions undetermined, and when the plaintiffs in error were thus driven to trial in spite of their objections, they agreed to this manner of proceeding, and it was a part of the stipulation that these things being determined, a jury should be impaneled to assess the amount of compensation to be awarded to the defendants for the interest condemned (trans. pp. 691-692).

While the Supreme Court of California did not here specifically mention the constitution of the United States, or any law of Congress or right claimed under them, yet they did state the controversy between the parties which necessarily involved the determination of a federal question.

7. Even if it were true that no claim was made to the protection of the Constitution of the United States or a right set up under any law of Congress, it was not necessary in this case that it should have been done. No one can make a specific claim to the protection of the constitution of the United States, or any act of Congress, or any treaty made by or under the authority of the United States, in the pleadings under the law of this state. The statute has prescribed the rules of pleading here, and they must be

observed. Section 426 of the Code of Civil Procedure of California declares that "the complaint must contain:

"1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;

"2. A statement of the facts constituting the cause of action in ordinary and concise language;

"3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

The answer must contain a general or specific denial or statement of new matter constituting a defense or counter-claim.

C. C. P., Sec. 437.

It is further provided that sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading may be stricken out upon such terms as the court may, in its discretion, impose. (Id. Sec. 463).

These provisions of the statute have been repeatedly construed, and it is now the settled law that under them, facts only must be stated, and that this means the facts as contradistinguished from the law and from argument, from hypothesis and from the evidence of the facts. (Green vs. Palmer, 15 Cal. 411, 414). Those facts, and those only, must be stated which constitute the cause of action, or defense, or the reply. Therefore, *first*, each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. . . . . *Second*, he must allege nothing affirmatively which he is not required to prove (id. p. 415).

Again: "In the second place, that nothing should be stated which is not essential to the claim or defense, or in other words, that none but issuable facts, should be stated. If this part of the rule be violated, the adverse party may move to strike out the unessential parts."

Id. p. 416.

This case has been approved time and time again.

It was approved in Dreux vs. Domet, 18 Cal. 88; Smith vs. Richmond, 19 Cal. 483; Bowen vs. Aubrey, 22 Cal. 566; Guy vs. Wash-

burn, 23 Cal. 112; Wilson vs. Cleveland, 30 Cal. 200; Brunk vs. Tucker, 42 Cal. 351.

It is obvious that under this rule, pleading acts of Congress or alleging that a particular right arises under the laws of the United States or of any act done by or under their authority, or is in violation of the constitution of the United States, or any such allegations are the statements of a mere legal conclusion, and would be stricken out on motion.

Again, it is established by the decisions of this court and of the Circuit Court of Appeals of the United States, that the prohibition of the Fourteenth Amendment of the Constitution of the United States against depriving one of his property without due process of law, is not limited to the action of the state through its legislature. But the prohibitions of the Fourteenth Amendment referred to all the instrumentalities of the state, to its legislative, executive and judicial authorities," and therefore, whoever, by virtue of public position under a state government, deprives another of any right protected by that Amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name, and for the state, and is qualified with the state's power, his act is that of the state. This must be so or, as we have often said, the constitutional prohibition has no meaning, and the state has clothed one of its agents with power to annul or evade it."

Chicago B. & Q. R. Co. vs. Chicago, 166 U. S. 226; 41 L. Ed. 979, 983-984.

In that case the court, on page 984, further said:

"These principles were enforced in the recent case of Scott vs. McNeal, 154 U. S. 34, in which it was held that the prohibitions of the 14th Amendment extended to all acts of the state, whether through its legislative, its executive, or its judicial authorities, and consequently it was held that a judgment of the highest court of the state by which a purchaser at an administration sale under an order of the probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law, contrary to the 14th Amendment."

This case of Chicago, B. & Q. R. Co. against Chicago, *supra*, was a condemnation proceeding. And in such cases, it is submitted that the doctrine here referred to is peculiarly applicable, for

in them it rarely happens that the question could be raised in the manner required as a general rule, for this plain reason; in such cases the judgment is the act by which the property is taken, and until the judgment itself is given, it cannot be known that it will be taken in violation of the constitutional provision. In this case, as will appear further, when we come to discuss the merits of the controversy, the plaintiffs in error objected that it could not rightfully be limited to the market value of the property at the time the summons was issued, because the staute itself said, in terms, that it was the actual value, and not the market value, that constituted the measure of compensation. The constitution of the State of California declares that private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made, in money, or ascertained and paid into court, for the owner irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases, in a court of record as shall be prescribed by law. It was impossible for the plaintiffs in error to know that any such interpretation would be put upon this provision of the constitution of the State of California and of the statute under which the court was proceding until it had so construed it in the opinion filed in this cause. But it did construe the actual value of section 1249 of the Code of Civil Procedure to mean the market value, and it did uphold the action of the court below in limiting the plaintiffs in error to proof of the market value at the time of the issuance of the summons, and did uphold the action of the court below in ruling, in divers ways, that the plaintiffs in error were not entitled even to the market value of the property at the time of the trial, but that whatever value may have accrued to it in the market by reason of anything discovered and made known subsequent to the issuance of the summons, could not be considered by the jury. But

all this comes by the judgment of the court. It has been many times ruled by this court that it is too late to make the objection in a petition for a re-hearing; it is not enough to make it in a brief, but the claim must appear on the record. And here, as already stated, it is the very judgment which we are now assailing upon this writ of error, that has accomplished the very thing of which we complain, if it has been accomplished at all. Hence we say again, that when the thing is done, it either must necessarily appear upon the record, or it never can be made to appear at all.

It is submitted that under these decisions of this court the jurisdiction in this case does exist, and this will more fully appear in many cases which will be cited in the course of the discussion of the questions involved herein, to which we now proceed.

II.

THE DECISION OF THE COURT AFFIRMING THE ACTION OF THE SUPERIOR COURT OF LOS ANGELES COUNTY IN PROCEEDING WITH THE TRIAL OF THE QUESTION OF THE AMOUNT OF COMPENSATION TO BE PAID TO THE PLAINTIFFS IN ERROR FOR THE PROPERTY TAKEN, WHILE AT THE SAME TIME LITIGATING THE QUESTION AS TO WHAT WAS THE PROPERTY TO BE TAKEN AND TO BE COMPENSATED FOR, AND ESPECIALLY THE TAKING OF THE VERDICT OF THE JURY UPON THE AMOUNT OF COMPENSATION WHEN IT HAD NEVER BEEN DETERMINED WHAT IT WAS THAT WAS THE SUBJECT OF THE COMPENSATION TO BE MADE, DID DEPRIVE THE PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS.

It might be doubted whether the construction which the supreme court of California put upon the constitution and laws of the state of California in the matter here under consideration was correct, but no such question can be raised in this case. The construction of state constitutions and statutes are for the state courts, and their decisions in these matters are controlling upon the courts of the United States.

Commercial Bank of Cincinnati vs. Buckingham, 12 L. Ed. 169-180.

Lawler vs. Walker, 14 L. Ed. 364-366.

Now in this case the court did decide that the proceeding of the court below on the trial of the action was proper. See the opinion of the court, transcript pp. 692, 696.

We note in passing, however, that the court did admit that this power did not proceed from section 1247 of the Code of Civil Procedure. That section declares that

"The court shall have power:

"1. To regulate and determine the place and manner of making

connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section twelve hundred and forty;

"2. To hear and determine all *adverse or conflicting* claims to the property sought to be condemned, and to the damages therefor;

"3. To determine the respective rights of different parties seeking condemnation of the same property."

This section of the statute, however, was so manifestly supplementing and completing the provisions which required all owners and claimants of the property, if known, to be brought in as defendants (C. C. P. Sec. 1244, sub. 2), and permitting all persons claiming an interest, to come in, though not named, and defend for their own rights (id. Sec. 1246), that it was obviously applying to controversies between the defendants themselves.

But now, what the jury is required to do is to determine the value of the whole property. If different persons hold separate interests, as if one be a tenant for life and another of the remainder, the jury are to determine the value of each interest.

Id. Sec. 1248, sub. 1.

That subdivision is as follows: After saying that the court, jury or referee must hear testimony, and thereupon must ascertain and assess, etc., subdivision 1 proceeds as follows:

"1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consist of different parcels, the value of each parcel and of each estate or interest therein should be separately assessed."

These provisions which we quote are, we say again, for the determination of the rights of the defendants as between themselves, but the jury are to ascertain the value of the whole, and this, we say, the court in its opinion admits, for, after quoting from section 1247, it says:

"These propositions are, of course, conceded by the appellants, but they contend that the right to set up and litigate adverse claims is confined by the very words of the statute, to those who are defendants. It is true the express provisions above quoted from section 1247 applies only to the conflicting claims of those who are made, or who make themselves, defendants in the proceeding, but

this is only because the interests of the defendants alone are to be condemned. The statute does not contemplate the condemnation of an interest which the plaintiff already has, or the payment of any damages except to compensate those whose property is to be taken away, and therefore the plaintiffs can have no concern in the determination of the adverse or conflicting claims to the property sought to be condemned and the damages therefor. But although this prohibition of the statute has no direct bearing on the questions here presented, it contains an express legislative recognition of the entire competency of the court to try and determine adverse claims to the property in a proceeding to condemn."

Transcript, pp. 692-693.

And independently of the provision of the statute which is referred to, the conclusion of the court was that under the statute the court could proceed as it did in this case, and we submit that that construction of the law of the state is conclusive upon this court.

Now we do not deny that the legislature of a state has the most ample powers in prescribing the procedure for the condemnation of private property for a public use, as it has a plenary power over the regulation of the proceeding in courts of justice for the purpose of obtaining any relief to which a party may be entitled. We do not claim that there is any limitation to this power save only this, that if the proceeding is such as is in violation of the constitution of the United States, then it is void, and if the statutes of this state as thus interpreted by the supreme court of the United States are in violation of the Fourteenth Amendment of the constitution of the United States, then they are void. We think this proposition has been decided by this court.

In Bridge Proprietors vs. Hoboken L. & I. Co., 1 Wall. 116; 17 L. Ed. 571, this court, after saying that it was objected by the defendants that the pleadings did not, in words, say that the statute under consideration there was void because it conflicted with the Constitution of the United States, and did not point out the special clause of the constitution supposed to render the act invalid, and after saying that it would be a new rule of pleading, and one altogether superfluous to require a party to set out specially the provision of the constitution of the United States on which he relies

for the action of the court in the protection of his rights, and after saying that if there was anything that the courts of this country could take judicial notice of without pleading it, it was the constitution of the United States, and if the plaintiff and defendant in their pleadings made a case which necessarily came within some provisions of that instrument, this court could recognize it without requiring the pleader to say, in words, "this paragraph of the constitution is the one involved in this case," and after much more upon this question (17 L. Ed. pp. 575-576), said:

"It is said, however, that it is not the validity of the Act of 1866 which is complained of by plaintiffs, but the construction placed upon that Act by the court. If this construction is one which violates the plaintiffs' contract and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract unless it takes jurisdiction of such cases."

In Morley vs. Lake Shore & Michigan Southern Ry. Co., 146 U. S. 162, 36 L. Ed. 925, 928, Mr. Justice Shiras, after having stated the rule, and cited many authorities to the effect of the obligatory character of the decision of a state court upon its own statutes and constitution, said:

"If, then, the law as enacted by the legislature and construed by the state judiciary, will be the law of the state, it follows that as to the proper construction of the statute and as to what should be regarded as among its terms, no federal question could arise. The most that could be claimed would be that although the statute of the state was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the constitution and judiciary act, subject to investigation here. Assuming, then, that the statute in question was correctly construed by the New York court, our only inquiry must be *as to the validity of the statute itself as construed by the state court.*"

So in Chicago, B. & Q. R. Co. against Chicago, 166 U. S. 226, 41 L. Ed. 979, 984-985, Mr. Justice Harlan, speaking for the court, said:

"But if, as this court has adjudged, a legislative act assuming

arbitrarily to take the property of one individual and give it to another individual would not be due process of law as enjoined by the 14th Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law, if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for a public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law if the necessary result be to deprive him of his property without compensation."

The only question, therefore, is whether, under the proceedings taken, which are thus declared by the supreme court of California to be in pursuance of the California statute, the plaintiffs in error were deprived of their property without due process of law. We do not suppose that any one would pretend that a statute which did, in direct terms, authorize a court to impanel a jury to assess the compensation to be paid for property in general terms, leaving it to be determined after the verdict came in, what was the property referred to and what are the things to be taken, was not in violation of the provision of the constitution referred to. But that is what was, in effect, done in this case. We have already stated what was done. After the trial had been proceeding before the jury for some time, the court stated that it had come to a conclusion on the preliminary issue, and it then proceeds to state those issues. The first is of no consequence here, but on page 217 of the transcript it will be seen, that, after stating that the other question submitted to the court was the interest of the city and of the defendants respectively in the waters of the river, the learned judge said:

"Upon this question I will follow the decisions in the Vernon

Irrigation Company against the City, and in the case of Lux against Haggin."

That in following that rule he thinks the city has a right to the waters of the river which is paramount to the rights of upper riparian proprietors; that he didn't mean to go so far as to say that the city would have the right to divert the waters above the lands of the defendants and deprive them of any use that they might make of the water going through the land, without compensation; that was a question upon which he had such doubts that he would not announce it as a rule in this case, particularly as he didn't think that portion of the rights of the defendants, (plaintiffs in error), is of such great value as to make it justifiable to take any risk on the subject. And he further said that the land sought to be condemned extends down to the lower boundary of the defendants' land; the right of the city, extends, however, to all the water of the stream, whether it flows on the surface or under the ground, and the rights of the defendants are subject to these rights of the city. That, however, gives the defendants a right to make whatever use of the water they can during any time when the city does not make use of it, either because it does not need it or because it does not care to use it. The right of the city extends only to the extent of its needs, and the rights come together at that point. So that whatever the value of the water is to defendants by reason of the fact that the city may not, at all times, need all of it, is a right which they have to value in this case, and which the jury must determine in arriving at their verdict. And he did not think it proper there to state his views in regard to what did constitute a stream of water, either above or underground.

The court concluded its dissertation by saying: "This is only an oral announcement," and he supposed that findings would have to be drawn and signed (trans. p. 217, fol. 315).

Now, the court began its instructions to the jury by saying, among other things:

"The questions arising in the case involving the right of the

plaintiff to condemn the property *and the nature and extent of the defendants' estate and interest in the land to be taken has been determined by the court.* The only question you are to decide is the amount of compensation which the defendants are entitled to, before their estate and interest in the land can be taken as proposed."

Transcript, pp. 642, 643, fol. 1008.

It will be noticed that the court here assumes that it has determined the nature and extent of the defendants' estate and interest in the land, but as we have already shown, the court had done nothing except make an oral announcement. It had not put its determination in the form which the statute required, and until which there was no decision in the case. These findings of fact will be found, Transcript pp. 58-60, and even if they had been filed before the verdict of the jury was given, they did not agree with the oral opinion nor with the instructions of the court. They did not agree with the oral announcement because the court found that all the allegations of the last amended complaint except paragraph III thereof are true (see trans. p 59, finding I). But the second allegation of the amended complaint states, among other things, that the bed of the river from its source to the northern boundary of the city, is composed of sandy soil into which the water sinks readily and forms subterranean streams flowing in well-defined channels beneath said bed, which said subterranean water rises to the surface in various places before reaching said city, and becomes a part of the surface water of said river. (Trans. p. 32, fol. 15).

None of this is contained in the oral announcement. The second finding presents the supposed modification of the allegation contained in paragraph III of the complaint. That finding introduces no new fact except that the city is the owner in fee simple of the paramount right to the use of all the waters of the Los Angeles river from its source to the southern boundary of the city, so far as may be needed from time to time, and that it is held in trust for the public purposes of supplying the inhabitants of said city with water for domestic uses and for supplying the water for the irrigation of the irrigable lands embraced in the four square

leagues of pueblo lands of plaintiff, and for all other municipal and public uses and purposes in said city. (Trans., p. 59, par. 2 of the findings).

It will be noticed that this goes somewhat beyond the allegation of the complaint, for there the language was "supplying the inhabitants of said city with water for irrigation of the irrigable lands in the four square leagues of the pueblo lands of plaintiff, and for other municipal uses in said city." (Trans. p. 33, par. III).

In the third finding, the court introduces a qualification to the rights of the plaintiff which deprived the jury or anybody else, of the possibility of any knowledge of what it was that the jury were to value, and that qualification or limitation is not contained in the oral announcement. In the latter the court, after stating the rights of the city, and saying that the right extended only to the supply of its needs, then declared that whatever the value of the water is to the defendants by reason of the fact that the city may not at all times need all of it, is a right which they have to value in this case, and which the jury must determine in arriving at their verdict. (Trans. p. 217); but in the findings of fact as filed, the court said in paragraph III, page 59, of the transcript, that the defendants have, subject to the said rights of plaintiff, the rights as riparian proprietors of the lands of which the lands sought to be condemned form part, the riparian right to use the water of said river for any and every purpose (which would not interfere with the equal rights or injure the lands of other riparian proprietors along said river above and below said lands), for which riparian proprietors are entitled to use such water. No other parties were before the court or the jury except these plaintiffs in error, and the City of Los Angeles. The Los Angeles river extends from the Sierra Madre or San Fernando mountains to the sea, and how was it possible for the jury to say what would be the extent of the riparian rights of the plaintiffs in error, after all these uses of the city were supplied when there was no evidence before them upon that subject, and

no parties before them by which a determination of such a question could be had?

In Charnoch vs. Higuerra, 111 Cal. 473, the supreme court of California held that no final or satisfactory adjustment of the respective rights of irrigation of riparian owners could be had, without the presence of every person having any right in the stream, and all the facts which could possibly bear upon the question should be laid before the court. Here, as already stated, in this court there were neither parties nor evidence. Under this limitation fixed by the court upon the rights of the plaintiffs in error as riparian proprietors, the jury had no recourse except to their own imaginations, but as we have said before, these findings were not before the jury at all, and this limitation was not in the oral opinion at all. The only other place where it is to be found is in the instructions given by the court to the jury. In the sixth instruction, the court said, "after the wants of the city are supplied, however, the defendants have the right to use the water of the river on their lands for any and every purpose which does not interfere with the equal rights or injure the lands of other riparian proprietors along the river above and below this land. These rights include a reasonable use of the water of the river on the land for irrigation, domestic purposes, watering stock or other lawful purposes, also to obtain power by means of the fall of the stream on the land, returning the water to the stream before it leaves the land; also the benefit of having the water flow in its accustomed manner through the land. The right to use the water to irrigate the land through which it runs is subject to the condition that other riparian owners along the stream have the same right, and if the water is not sufficient for all, neither has the right to use more than his reasonable share. All these rights are incident to the land because the river borders on the land; and they are not mere appurtenances, but they are part and parcel of the land itself."

Transcript p. 644, fol. 1010, instruction 6.

With these various announcements by the court made at different times, no two of them agreeing, and the one which really con-

stituted the decision and which was carried into the sixth instruction of the court, and even enlarged upon, which were not made at all until after the verdict, how did the jury know what it was called upon to value?

We submit that under this procedure, sanctioned by the supreme court of California, the jury need never know, and in this case they did not know, and could not have known, what it was that they were to value and make compensation for. And if this proceeding be not in violation of the 14th Amendment of the Federal Constitution, then a jury may be impaneled in any condemnation suit to determine the compensation to be paid for something, which something is to be afterwards ascertained by somebody else, and which in this case never was determined by anybody, and with the parties and evidence before either judge or jury, or both, could not have been determined.

In the case of A. Backus, Jr., & Sons vs. The Fort Street Union Depot Company, 169 U. S. 557, 42 L. Ed. 853, 857-858, Mr. Justice Brewer delivering the opinion of the court, said:

"It is also not open to further dispute, since the decision of the Chicago, Burlington & Q. R. R. Co. vs. Chicago, 166 U. S. 226, (41:979), that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public uses, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation."

The court then referred to the restriction placed in the opinion filed in that case upon its examination into the proceedings of the state court, and the substance of the opinion of the majority of the court was that mere inconvenience of the procedure, nor changes in the opinion of the court from time to time, upon the construction of state statutes, amounted either to deprive one of his property without due process of law, or denying him the equal protection of the laws, nor did this court sit merely to review errors or supposed errors of the state court, but the error, if any there be, must be such as amounts to a disregard of the right to just compensation, and not merely an error in the administration of the law under

which those proceedings were instituted, and that the limit of interference by this court is reached when it appears that no fundamental rights have been disregarded by the state tribunal.

42 L. Ed. 861.

But nevertheless, to the extent declared in the Chicago, Burlington case, and approved in the Backus case, this court may examine into the proceedings had in the state court for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owners' right to just compensation, and this is the extent for which we contend in this case.

The Honorable Chief Justice, in his opinion, in this cause, and while treating of this particular question, and acknowledging its importance, said that:

"In such case (that is to say, where one claiming an interest in the property is also the plaintiff seeking to condemn that property) it is certainly desirable that the law should supply a *convenient procedure* by which he could secure exclusive control and ownership of the property upon payment of the value of the outstanding shares, or of the whole, less the amount secured by lien, or as diminished by the existing servitudes."

And after saying that:

"The defendants (the plaintiffs in error) do not seem to contest the proposition that our statute was adequate to the exigencies of such a case, but they contend that, when the interest asserted by plaintiff is disputed, the proceeding to condemn must be held in suspense until, in a separate action, the respective interests of the parties are judicially determined."

Transcript, p. 693.

And then stating as the court's conclusion that this is not necessary, they then among other things, say:

"We see no reason for holding that plaintiff is debarred from proceeding in such a case, nor can we see that the trial of all the issues in one action is attended with any special inconvenience. In whatever mode the plaintiff's interest in the property might be determined—whether in a separate action or preliminarily in the proceeding to condemn as was done in this case—the same consequence would follow, that is to say, the jury called to try the question of damages would require instructions as to the nature

and quantity of outstanding interest remaining in the defendants, upon which to base an estimate of the damages, and the defendant would have the same remedy in case of erroneous instructions in either case. Considerations of convenience, therefore, do not seem to sustain the contention of appellant on this point."

Transcript, pp. 693-694.

If we correctly understand this, the meaning is that no matter what may be the nature of the proceeding in which a question of title to the property or of conflicting interest between the plaintiffs and defendant come in litigation, the same objections might be made to the course of procedure where damages were sought to be recovered, but it is respectfully submitted that this is a mistake. If A. brings a suit against B. for trespass upon real property, alleging ownership or possession which is denied, and the issue between the parties is in fact upon their respective rights in the property, it is obvious that a verdict of the jury for any damages is a verdict in favor of the plaintiff's title. And we know that the jury has so determined. Indeed, in ordinary actions, the verdict is for the plaintiff or the defendant, and in such actions, too, if there be any complications of conflicting interests, the parties are entitled, and may obtain specific findings upon the particular matters in issue. But that is not the case in a condemnation proceeding; the jury are here to determine, not what the damage done by any wrongful act is, but it is proposed to take the property, as a matter of legal right, and the jury are called upon to fix the compensation to be paid therefor. Now, it is obvious that in such a case, in any case where there is a controversy between the parties plaintiff and defendant, respecting their several rights in the property, it is not possible to know what the jury have determined. It is not possible in this case, and it would not be even if it were stripped of the difficulties which we have just been considering, namely, that there was never any determination by anybody of the thing to be condemned. But in a condemnation suit, the jury is instructed that if you find thus and so, why then the plaintiff is the owner of the property or of an interest in it, and to the extent of that interest you are not to

consider it in making compensation; and if the evidence is conflicting (as it nearly always is) upon the value of the property and of every interest in it, and the jury returns the only verdict which the statute authorizes, and says the compensation to be paid is so much money, the fixing of that compensation would rarely enable any one to know how the jury had found upon the question of the interest of the plaintiff in the property. If a motion for a new trial is made, and the verdict assailed upon the insufficiency of the evidence, it might appear that the evidence was quite sufficient to sustain the verdict if the jury excluded from the computation the interest claimed by the plaintiff or some part thereof; and on the other hand, if included, not so inadequate as to make it manifest that it was not excluded. Take the case before the court. We know that there was no contradiction in the evidence upon the subject of the value of this percolating water, and assuming that there was any such amount of water, or anything approaching it, as we contended there was, we claim that the jury did not include it. But it is impossible to know from this verdict whether the jury meant to say "there is no percolating water in this land," or whether they were arbitrarily finding upon the value without evidence, nor can we say whether they found that there was some percolating water, but that the amount of it was very small. In other words, it is impossible in this case, and it would be in any case, to know what the jury had or had not considered, or what they had found or had not found as to the interests of the parties in the property.

And the difficulties which attend the procedure in this case will occur in every such case. Neither the constitution nor the statute has pointed out the mode, or prescribed any procedure by which it would be possible to know what view the jury had taken of any conflicting evidence between the plaintiff and the defendant. And while there might be no objection to a legislative act which prescribed that these questions might all be determined in one action, yet whether it be in one or a dozen, in order to secure to one his constitutional rights, it would be necessary to try, and to definitely

and conclusively fix the rights of the parties, before the evidence as to the amount of compensation to be paid is introduced.

The plaintiff might make claim to half a dozen different interests in the property, claiming the fee of some portions and liens, easements and incumbrances upon other portions of it, and these may all be disputed, and if they are then to undertake to introduce evidence for the purpose of having the amount of compensation to be paid determined, the evidence must be introduced with a view to every possible theory, and that distinctly and independently of each other, and if the evidence is conflicting, which it always is, the verdict of the jury would not necessarily, and generally would not at all show, what they had determined, upon any of those claims. We admit, if this argument goes no further than merely to overthrow the suggestion that there is no inconvenience attached to this method of procedure, then it is of no consequence in this court. We are not denying the right of the legislature of the state of California to prescribe an inconvenient procedure for the condemnation of private property for a public use. But there is no more power to take a part of one's property for a public use without compensation, than there is to take the whole, and a procedure which results in taking a part without compensation, is just as much in violation of the constitution of the United States, as though the whole had been taken without just compensation. And if we are correct in this, then the question here comes at last to this: Is a procedure prescribed by the legislature of a particular state for the condemnation of private property for a public use, which is of such character that the whole or some part of it may be taken without compensation, and the owner cannot possibly know whether it has been or not, consistent with the constitutional protection of the 14th Amendment referred to? If this court has the power to see to it that one's property shall not be taken for such use without just compensation, is it not absolutely essential to the exercise of that power that it should have the means of knowing whether it has been done or not? Can that jurisdiction be defeated by a

method of procedure which precludes the ascertainment of the fact as to whether the constitution has been evaded or set at naught? Is not a statute which baffles all inquiry into the question of whether one has been so deprived of his property, in violation of the 14th Amendment?

We have referred to the findings of fact as being the only decision under our statute in the case tried before a court without a jury. It is provided in section 632 of the Code of Civil Procedure of California, that upon the trial of a question of fact by the court, its decision must be given in writing, and filed with the clerk within thirty days after the cause is submitted for decision. And section 633 declares, that in giving the decision, the facts found and conclusions of law must be separately stated, and judgment upon the decision must be entered accordingly. Section 634 provides for the manner in which findings of fact may be waived, and no such waiver was made here. Findings of fact under these provisions of the code are necessary to sustain the judgment.

Mace vs. O'Reilly, 70 Cal. 231, 235.

And in Brodie vs. Conklin, 98 Cal. 360, 362, the Supreme Court of California said:

"Upon the expiration of his term of office the judicial power of Judge Rooney ceased, and it was not competent for him thereafter to do any act necessary to complete the trial of any cause which then remained unfinished. * * * The trial of the issues of fact in an action is not completed until the decision upon those issues has been given by the court. * * * And this decision must not only be given in writing, but it must also be filed with the clerk. If not filed until after the expiration of the term of office, it cannot form the basis of a judgment. * * *" (The stars stand for the authorities cited in the opinion.)

There are many cases to the same effect. It had been decided long before in Comstock Quicksilver Mining Co. against the Superior Court of Santa Cruz County, 57 Cal. 625-626, that it is not the signing, but the *filing* of the findings and order for judgment that determines the action.

There the judge of Monterey county had sat in the superior

court of Santa Cruz county, and tried the case. He returned to Monterey county and there prepared and signed his findings of fact and conclusions of law, and ordered the judgment to be entered thereon, and they were transmitted to the clerk of the superior court of Santa Cruz county, who filed them and entered judgment accordingly. It was claimed that the court had the jurisdiction to hear and determine the case, but that the hearing and determination should have been in the county in which the action was pending, which was conceded by the Supreme Court, but they said the cause was not determined until the findings and order of judgment were filed with the clerk of the superior court of Santa Cruz county.

And it is upon these authorities and the statute which they construe that we say the trial of the cause before the judge for the purpose of determining the property rights of the respective parties in the lands sought to be condemned was not completed, nor was the question determined until the findings were filed, which, as we have said before, was on the 2nd day of April, the day after the verdict of the jury had been entered, and the jury discharged; and that such proceeding does deprive one of his property without due process of law, and it cannot be sanctified by the fact that the legislature of California has authorized it.

III.

THE STATUTE OF CALIFORNIA (SECTION 1249 OF THE CODE OF CIVIL PROCEDURE) DECLARING THAT FOR THE PURPOSE OF ASSESSING COMPENSATION OF DAMAGES, THE RIGHT THERETO SHALL BE DEEMED TO HAVE ACCRUED AT THE DATE OF THE SUMMONS, AND ITS ACTUAL VALUE AT THAT DATE SHALL BE THE MEASURE OF COMPENSATION FOR ALL PROPERTY TO BE ACTUALLY TAKEN, ETC., AS CONSTRUED BY THE SUPREME COURT OF CALIFORNIA, IS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED

STATES, BECAUSE IT DOES AUTHORIZE THE TAKING OF PRIVATE PROPERTY FOR A PUBLIC USE WITHOUT JUST COMPENSATION.

The decisions of this court upon this question have already been cited. Taking private property for a public use without just compensation is in violation of the constitutional amendment referred to. The instructions of the superior court given to the jury upon this subject were, if not aided by the opinion of the supreme court of California, contradictory if not meaningless. We shall here call attention to a few of those instructions, and also the instructions refused, for the purpose of presenting to the court what the learned judge of the superior court had to say upon this subject. The instructions asked by the defendants will be found, pages 662-671, and the first one asked is as follows:

"1.

"It is your duty in this case to fix and that which you are called upon to determine is the amount to be paid to the defendants for taking the land here sought to be condemned, and for the purpose of assessing the compensation and damages the right is deemed to have accrued at the date of the summons, and the actual value at that date is the measure of compensation for all property actually taken.

SHAW, J."

"Given. (See No. 2.)

Transcript, p. 662, fol. 1040.

The second instruction was a similar direction with reference to determining the damages to property not taken.

Id. p. 662, fol. 1041.

This instruction is also stated to have been given in substance, and we are referred to the same instruction given by the court. This instruction so given by the court and numbered "2," will be found in the transcript, page 643, and it is as follows:

"2.

This compensation is to be composed of two parts or elements; first, the value of the interest and estate of the defendants in the land described in the complaint; second, the amount of the damages which will accrue to the other land of the defendants, which is a part of the same parcel as the land to be taken, by reason of the

severance of the land to be condemned, and the construction of works thereon as proposed by the plaintiff. For the purpose of assessing this compensation and damages, the right is deemed to to have accrued at the date of the summons, which was June 27, 1893, and the actual value at that date is the measure of value for all property taken and the basis of damages for all property injuriously affected."

Transcript, p. 643, fols. 1008-1009.

Now, if the instructions of the court ended there, it would be true that the learned judge had given the instructions which we asked in this No. II; but that is not all that he has had to say upon that subject. In the 11th instruction given by him he says:

"Whatever additional *market value* the land may have had by reason of these rights and advantages, so far as they do not interfere with or impair the rights of the city aforesaid, *this value* the defendants are entitled to as a part of the value of the land before it can be taken, and this value you must include in your estimate of the value of the land sought to be condemned."

Transcript, p. 645, fol. 1012.

Here is is obvious that throughout that instruction the mind of the jury is directed merely to the *market* value.

The XII instruction, transcript, pages 645-646, is quite lengthy; and as but a small portion of it bears upon this question, and that is all in the concluding clause, we quote that only. It is as follows:

"Whatever additional *market value* this land may have had by reason of the presence therein of waters of this class, or by reason of the feasibility of separating it from the land, or of using it on the land; or of conducting it to some other place for use or sale, or of the great *market value* of such water for such purposes or by reason of all these things combined, or by reason of any other lawful benefit or advantage which this water gives, this additional *market value* inures to the benefit of the defendants and is a part of the compensation to which they are entitled in this case as the value of the land to be condemned."

Here again the jury could not have understood this in any other sense than as a direction to them that it was the *market value* with which they were concerned.

Passing over several instructions which do not deal with the

value at all, we call attention to instruction 22, page 651, fol. 1022:

"In determining the actual value of the land taken, you are to take into consideration all of those factors which enter into, and make up its value; the altitude of the tract, the capability of taking to the city of Los Angeles and to the country east and west of it by gravity, the waters which may be collected on said land without taking the waters of the natural stream; the amount of the water which can be thus collected; the fact that the land sought to be condemned is so situated as to constitute the best place along the Los Angeles river for obtaining a water supply and conducting the same either to the city or other tracts east and west of it; the needs of water in different places within reach of this tract of land, and of the water which may be thus collected thereon; all are circumstances to be considered by you in determining its *actual value*."

Here we have a return to the actual value without any explanation, or definition, of the sense in which that term is used.

In the 23rd instruction the jury are instructed that if they believe certain things which are therein stated, they must take those facts into consideration so far as they diminish or destroy the *value* of the rights of the defendants to said waters, to such portion thereof as could be so diverted or drained as to deprive the defendants of the practical use thereof.

Transcript p. 651, fol. 1023.

Here the term "value" is taken without any modifying word.

In the 24th instruction, pages 651-652, they are told that in estimating the value of the riparian rights of the defendants to utilize the flow of the river for generation of power, they were instructed that the water so used must be taken from, and returned to, the river at points situated on the land sought to be condemned; that no speculative valuation could be entertained by them; they were authorized to take into consideration the cost of constructing and maintaining the works necessary to develop and utilize the power, and the difficulty, if any, of permanently maintaining and operating said works, etc. And finally concludes the instruction thus:

"And that if the jury find that the *actual market value* of the naked land at the time of the issuing of the summons was not increased by reason of the existence of this right, they must not take

it into account in fixing the amount of compensation."

Instruction 25, page 652 of the transcript, was as follows:

"In determining the actual value at the date of the summons you are not to take, as the measure of that value, what an owner could realize at a forced sale, but the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property; and in making that estimate you should consider the use for which the property is suitable; having regard to the existing business or wants of the community, or such as might have been reasonably expected in the immediate future. You will also consider the fitness of this land for agriculture and its value for that purpose, and for fruit or stock raising, for the timber growing on it, as well as the water which may be in the soil, not a part of the river, and from these and all other uses to which the water may be put from which profit may be derived, and from all the evidence on the subject, you will determine its *actual market value* at that date."

Here in the first part of the instruction the term used is the "*actual value*," and in the last portion the jury were told that they were to determine its "*actual market value*" at that date.

Instruction 26 is as follows:

"The market value of the land is not necessarily the value of the land in its present or prospective use to the owner; nor is it the value which it would be to the city as a location for headworks; nor the sum which the city might be compelled to give for it by reason of the necessity it may be under to obtain it; nor is it the sum that could be derived from the land for any special purpose for which it may be suitable; all these things, if shown by the evidence may be considered as bearing on the question, but only so far as it may appear that they affect the *actual market value* at the date of the summons, and the thing you are to determine *is such actual market value* at the date stated."

Transcript, p. 652, fol. 1024.

Here the order is reversed. In the first part of the instruction the term is the "*market value*," and in the latter part they are to consider these things only so far as it may appear that they affected the "*actual market value*" at the date of the summons, "*and the thing you are to determine is such actual market value at the date stated.*"

Instructions 27, 28 and 29 are as follows:

"27.

"Although you may believe from the evidence that by reason of things done, discovered or ascertained since June 27, 1893, it now appears that the land was then more valuable for any purpose or use than it was then known to be, yet you cannot consider such additional value, unless you believe also that these things were sufficiently known or obvious in June, 1893, to affect the *market value* at that time and did so affect it.

"28.

"If the jury find that any of the underground waters of the lands sought to be condemned are not a part of the waters of the Los Angeles river, they can consider that fact in fixing compensation only so far as it tended, if at all, to *affect the actual market value* of the land at the date of issuing the summons disregarding any acts done upon the lands or information acquired concerning said waters since said date.

"29.

"You are entitled to consider the evidence regarding the quantity of subterranean waters in the lands in question, and their value, only in arriving at a just determination of the market value of the lands sought to be condemned on the 27th day of June, 1893. Wherefore, if you believe that said waters did not give said lands an additional market value at that date, or that if an additional *market value* were given, but the same did not equal the real value of said waters, then you must place on said lands a valuation equal only to the market value which they then had, including such additional *market value* which said waters gave to said lands irrespective of the true value of said waters.

"If, for instance, said lands could not have been sold in the market on said date (the owners having had abundant time to find a purchaser, such as would generally be taken by an owner trying to sell like property), for more than a certain sum, then you must not find the value of said lands to be greater than said sum, although in fact you may believe that the waters in said land made them worth more than that sum."

Transcript, pp. 652-653, fols. 1024-1026.

In these instructions it is that we find the jury told that they could not consider anything which had been discovered or ascertained since the date of the issuance of the summons, in determining its *actual market value*.

In Instructions 30 and 31 the court turns its attention to the damages to the remainder of the tract not taken. And in instruction 32 they were told that from all these considerations it was

their duty to determine what was a reasonable, fair and just compensation to the defendants for their right, title, interest and estate in the property described in the complaint, and sought to be condemned in this action, and what, upon a reasonable, fair and just consideration of the evidence was the true amount of the damage that would be done to the remaining portion . . . . . embraced in the same parcel, by the severance of it from the portions sought to be condemned, and to return the several amounts in their verdict.

Transcript, p. 654, fol. 1027.

Before the Supreme Court of California we contended that we were entitled to a reversal of this cause upon these instructions, regardless of what was the true basis for estimating the compensation, because these terms were used in such a way that it was not possible for the jury, nor anyone else, to know what it was that they were to determine as being the compensation to which the defendants were entitled; that at one time it was the *value*, another, the *actual value*, another the *actual market value*, and fourthly, the *market value;* that if these terms were not intended to mean different things, they ought not to have been employed; and if they were so intended, they were contradictory; that if they were contradictory, the judgment should be reversed and a new trial ordered, because it had been repeatedly determined by the Supreme Court of this State that contradictory instructions to a jury was not only an error, but an error for which the judgment must necessarily be reversed. This has been decided so often in this State that it would be but a waste of time of the court to ask attention to all of those cases. We quote from two or three of them, and only to show that the point is so ruled, and the reasons for so ruling.

In Brown vs. McAllister, 30 Cal. 577, the court said:

"The two propositions are wholly repugnant and cannot stand together; and for this reason, if there were no other error in the record, the judgment must be reversed. Where the instructions on a material point are contradictory it is impossible for the jury to decide which should prevail, and it is equally impossible, after the

verdict, to know that the jury was not influenced by that instruction, which was erroneous, and the one or the other must necessarily be, where the two are repugnant."

This case is referred to, and this passage is quoted, in McCreery vs. Everding, 44 Cal. 246, 251-253.

In Estate of Cunningham, 52 Cal. 465, 466, the court, after stating some of the facts, said:

"Under these circumstances the court below first instructed the jury that they should find that the will was not obtained by undue influence. The circumstances, if true, that the testatrix was in this condition when she executed the will, was pertinent evidence in connection with other circumstances in proof upon the question of undue influence; inasmuch as a person in that condition might be more readily influenced than if sober at the time. In this view the instruction as given was erroneous.

"Subsequently the court instructed the jury that the question of 'undue influence, menace, duress and fraud' in the execution of this will was one submitted to them for their verdict. In short, the two instructions were contradictory—the one withdrawing from the jury, and the other submitting to them the same question of fact, and must have confused them in their deliberations."

In Sappenfield vs. Main Street, etc., R. R. Co., 91 Cal. 48, 59, the court, after quoting several instructions given by the court to the jury, said:

"The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were *bound to accept all the propositions* that the court instructed them upon as a correct statement of the law by which they were to be guided, and if the several instructions are inconsistent or contradictory, it is impossible to tell which is adopted by them in reaching their verdict."

Such is the rule and its reasons as established by the decisions of the Supreme Court of California. To be sure, they have told us in other cases that the mere fact that there may be an apparent inconsistency, or contradiction, between isolated sentences is not sufficient to reverse, if the instructions, when read as a whole, make it appear that the jury was correctly instructed and that the inconsistencies or contradictions are apparent rather than *real*.

Now, in the opinions delivered in this cause in the Supreme Court of California, there are two different modes presented of rescuing these instructions from the charge of being contradictory. There were two opinions delivered in this case, one by the Honorable Chief Justice, which will be found in the transcript, pages 689-722; 124 Cal. 604-647, the other, by Mr. Justice Temple (trans. pp. 722-724; 124 Cal. 647-651).

We first note that the opinion of the Honorable Chief Justice was evidently written upon the assumption that the judgment was to be reversed and a new trial ordered. In the transcript, on page 720, the learned Chief Justice, under the 12th subdivision of his argument, says:

"It is contended that the evidence is insufficient to justify the verdict of the jury or the findings of the court. *Since the conclusions above stated involve a re-trial of the issues submitted to the jury*, I deem it necessary to notice the first branch of this proposition, and my remarks will be confined to the second.

"Does the evidence sustain the findings upon the issues tried by the court?"

And then he proceeds to discuss that question, and he concludes as follows:

"For the reasons stated in the foregoing opinion I think the judgment and order of the Superior Court should be reversed, and the cause remanded for a new trial as to the single issue of compensation and damages—the issue, that is to say, which was submitted to the jury on the former trial."

Transcript, p. 722.

The first of these passages may be found in 124 Cal. 645-646, and the conclusion on page 647.

And he says, after quoting several of these instructions, (trans. pp. 717-719), and after stating that another objection to these instructions was that the court confuses "actual value" which is the true measure of compensation, with "market value" and "actual market value" (id. 719), he said:

"We do not think the instructions are self-contradictory, and their meaning we take to be this: 'Actual value' is the measure of compensation, but 'market value' *is the criterion of actual value*,

and the definition of market value is given in the instructions numbered 25, 26, etc. If, then, these instructions lay down a correct rule for ascertaining actual value, the charge as a whole is not erroneous. In most respects the charge is sustained by previous decisions of this court (San Diego vs. Neale, 78 Cal. 63; Spring V. W. W. vs. Drinkhouse, 92 Cal. 528). But there is one objection strongly urged in this case which was not involved and could not have been considered in any case formerly decided here.

"In several of these instructions the jury are told in effect that in estimating the value of these lands they must not take into consideration any fact discovered since the summons was issued. In other words, to use the illustration put by appellants, if a gold mine worth millions of dollars had been discovered in this land the day after the issuance of summons, the city could take the land by paying its value for agricultural purposes.

"This conclusion, it is true, follows logically from the proposition that market value at the date of the summons is to control, and that is the idea upon which the instructions are based. But I think this is a mistaken idea. The thing to be ascertained is not market value, but actual value (C. C. P., Sec. 1249), and the only reason why market value is taken as the criterion of compensation in ordinary cases is because it is in such cases the true measure of actual value—the only practical test. But in a case where discoveries made after the issuance of summons demonstrate that the actual intrinsic value of the land at that date was greater than its market value—in other words, when it appears that market value is no criterion of actual value—those discoveries should be taken into consideration. As such discoveries were claimed in this case, I think the court erred in giving and refusing the instructions referred to."

Transcript, p. 719.

Some portions of the opinion of the learned Chief Justice indicate that evidence of market value would be admissible because it might, in some way, tend to illustrate, or might bear upon the question of the actual value, and therefore these instructions might not be inconsistent. But in his opinion it was evident, taking them all together, that the court below meant to make the market value the measure of compensation instead of the actual value, which is the term used by the statute.

In the opinion of the Honorable Associate Justice Temple, it is manifest that he reconciles them upon this principle, that no matter

what may be the terms in which the value is expressed, the meaning is always "market value." He says:

"The chief justice concedes that ordinarily market value is the true measure and the only practical test of the actual value, still, 'in a case where discoveries made after the issuance of summons demonstrate that the actual intrinsic value of the land, at that date, was greater than its market value—in other words, when it appears that market value is no criterion of actual value—those discoveries should be taken into consideration.'"

And after taking up the illustration from the gold mine of a known actual value of millions, he says:

"It is difficult to give any meaning to it when so used, but in regard to a gold mine it must have reference to the amount which could be taken out of it over and above the cost of extraction. This could not be known until the mine was worked out, and therefore whenever it was valued necessarily the value could not be the actual, intrinsic value, as defined, but would necessarily be its market value. So the proposed value only changes the statutory date at which the right of the city is deemed to accrue, and when the value is to be estimated. It is contended that the right must be deemed to have accrued and the valuation been made after the other elements of value have been discovered.

"The phrase actual value is sometimes used in contradistinction to market value to indicate that property is valued too high to make it a good investment. If the market value of the land was one hundred dollars per acre, it would not be permissible to show that the real or actual value was less, and that the market value was inflated. The owner could get the market value and less would not make him whole. The government can take private property for its uses at any time conditioned only that the public shall compensate the owner, that it shall pay what it is worth when taken. This value must be the market or exchange value, *for there can be no other.* Value, which determines the price at which the owner must sell, must be the exchange or market value, and *actual value* means actual market value."

Transcript, pp. 722-723, 124 Cal. 647-649.

Thus it will be seen that the learned Chief Justice indicates that in any case, although under the statute the compensation must be the actual value, evidence of the market value might be admissible as bearing upon the question, and in some cases, determining it; but this, let it be noted, is true because actual value and market value do often occur. They are sometimes one and the same

thing. But the honorable Chief Justice, as did Mr. Justice Temple, says that the Superior Court was using all these terms in the sense of "market value," and because he was, the instructions were not inconsistent, but in the opinion of the Chief Justice erroneous. Mr. Justice Temple and the four learned justices who concurred with him, also see that the judge of the court below was making market value the amount of compensation, but think the instructions were correct because there isn't anything else but market value to be regarded as compensation in condemnation cases; and hence they construe this statute to mean "market value," notwithstanding it said in terms as plainly as it could speak, that it was the *actual* value, and this is the construction thus put upon this phrase in the statutes of this State by the majority of the court.

But now it is submitted that this gives to the statute a meaning which is in violation of the constitution of the United States, and deprives the defendants (the plaintiffs in error) of their property without due process of law; and we submit further, that whether this is so or not, depends entirely upon the question of whether Mr. Justice Temple and those who concurred with him were correct in their views, which practically were, that "actual value" and "market value" are synonymous terms, and therefore that when "market value" is given, the property is taken for a just compensation. In this, we submit, that they are mistaken. The gold mine proposition is not so easily avoided. To tell us that a gold mine must be worked out before it can be known that its actual value is any greater or less than its market value, contains several erroneous assumptions. In the first place, proof of actual value is not required to amount to a demonstration, nor to an absolute certainty, any more than the proof of any other fact that is put in issue in a judicial proceeding. The market value can be determined with no greater certainty than the actual value. The opinions of various persons of various degrees of experience and skill are introduced in evidence; perhaps some actual sales in the vicinity, or offers made and refused, but these opinions of the experts or of other persons

not experts never do agree; nor are the other circumstances or other evidence of such a character as to preclude all possibility of doubt, and the jury must determine from the whole what, in their opinion, is the market value, and their opinions are generally not a bit better than other people's. They have only this quality that distinguishes them from the opinions of others, namely, that being the tribunal constituted for the purpose of determining it, their verdict is conclusive except against certain methods of attack. And so the thing to be proven is no easier in one case than in another. If we were attempting to ascertain the actual value of lands for agricultural purposes, it is no more easily proven than the actual value of a gold mine. In many cases it is not half so easily proven, nor so certainly fixed. While the full extent of the value of a gold mine is probably never known till it is worked out, yet we do know that there is sometimes laid bare to the vision and subjected to actual tests, enough to know that its actual value is far beyond any market value that it would possess at the date of the issuance of the summons, and that fact might be made known by developments made after the issuance of a summons. Many tracts of mining ground until the mines are developed are not worth a cent. But mines of enormous value may be discovered by exploration and that may happen after the issuance of a summons. Nor is this all of it. The discoveries made after the issuance of the summons might be made within a few days before the trial, and those things might not be known, and frequently are not known, to the general public, and their market value might not, for that reason, be increased one cent, and yet, under the decision here, nothing but that market value would be considered, and furthermore, it is the market value at the date of the issuance of the summons. And the fact here suggested, and which, as we have said before, was a fact in this case, Mr. Justice Temple seems to have overlooked, namely, that nothing was known at the time of the issuance of this summons of the wealth of these lands in the percolating waters therein. They were discovered long subsequent to the issuance of the summons, and in-

deed, the discovery was mainly the result of the explorations made by the different parties to the action in preparation for this trial. It was because of this that the market value at the time of the issuance of the summons and at the time of the trial of this cause were not only entirely different, but the latter was easily fifteen times the value that the market value was at the time of the issuance of the summons. But this was not by reason of any additions made to the land after issuance of the summons, but its actual value at that time for the same purposes was just as great as it was at the time of the trial, and it is only by reducing "actual value" and "market value" to equivalent terms that the instructions could be upheld at all, and when they are reduced to equivalent terms, it is respectfully submitted, that the statute is in violation of the Federal Constitution, for when the "actual value" is largely in excess of the "market value" at the time of the issuance of the summons, then the market value at that time is not just compensation.

IV.

THE CITY OF LOS ANGELES HAS NO SUCH PRIOR AND PARAMOUNT RIGHT TO THE WATERS OF THE LOS ANGELES RIVER, EITHER SURFACE OR SUBTERRANEAN, AS WAS ADJUDGED IN THIS CASE.

It is not now any longer open to question that whatever rights in the lands within the ceded territory the Mexican government still possessed at the time of the cession to the United States passed to the latter government.

In Palmer vs. Low, 98 U. S. 1, 25, L. Ed. 60, 64, this court said:

"At the time of the conquest the pueblo, of which the city of San Francisco became the successor, did not have an indefeasible estate in the unconveyed portion of these lands, but only a limited right of disposition and use, subject in all particulars to the control of the government of the country. 'It was a right which the government might refuse to recognize at all, or might recognize in a qualified form.' . . . . . Upon the conquest, the United States succeeded to the rights and authority of the Mexican government, subject only to their obligations under the Treaty of Guadalupe Hidal-

go. As before that time the fee had not passed out of the government of Mexico, it was transferred to the United States by the conquest and the treaty which followed. Before, therefore, the estate in the pueblo could become absolute and indefeasible, some action was required on the part of the United States. It is conceded that this action was not taken until July 1, 1864. Down to that time the city held under its original imperfect Mexican title only. Afterwards it was possessed of the fee 'for the uses and purposes specified' in the Van Ness Ordinance."

And in the United States vs. Santa Fe, 165 U. S. 675, 41 L. Ed. 874, 884, this court, after referring to the decision in San Francisco vs. United States, 4 Sawyer, 561, wherein it was held, among other things, that the lands appertaining to the pueblo were subject, until by grant from the proper authorities, they were vested in private proprietorship, to appropriation for public uses by the former government, and since the acquisition of the country by the United States, and wherein the court had also assumed that the pueblo held title to 4 square leagues under the Mexican laws, and that the claim of the city was confirmed, in trust, etc., and there was excepted from the confirmation such parcels of land within the 4 square leagues as had been theretofore reserved or adjudicated to public uses by the United States, and also such parcels of land as have been, by grants from the lawful authority, vested in private proprietorship and finally confirmed to parties claiming under such grants, by the tribunals of the United States, said that this decision was in conflict with the claim of the city that under the Mexican law it was entitled, as a matter of right, to 4 square leagues, is shown by the finding of the court that whatever was the right in the city, it was so inchoate that up to the time of the confirmation by the United States, all the ungranted land within the area claimed was subject to such dedication for public purposes as the United States saw fit to make, that is, that the whole ungranted land covered by the claim was substantially public domain at the entire disposition of the United States for public purposes. And this doctrine is fully recognized by the Supreme Court of California.

Holladay vs. City and County of San Francisco, 124 Cal. 352, 355-356.

Commissioner Britt, at the pages last cited, says:

"It is unnecessary to investigate anew the nature and foundations of the title of the city to the pueblo lands; no claim is made that any private right had attached to the land in controversy at the time of the conquest of the country in 1846, and the title, with that to other unappropriated land of the pueblo, undoubtedly passed to the United States."

And in Galvin vs. Palmer, 113 Cal. 46, 52, it was said:

"Their title from this source depends for its validity upon the soundness of the claim which they urge, that the land originally belonged to the City of San Francisco. This claim, however, is untenable. Upon the conquest of California title to the land of the pueblo which had not passed to private ownership vested in the United States."

And in United States vs. Sandoval, 168 U. S. 278, 42 L. Ed. 108, 173-174, the court said, quoting from Ainsa vs. United States, 161 U. S. 108, 223, 40 L. Ed. 673, 678:)

"But under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the court of private land claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States.

"This was reaffirmed in United States vs. Santa Fe, 165 U. S. 674, 714, 41 L. Ed. 874, and Mr. Justice White, speaking for the court, said:

"An inchoate claim, which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, creating the court of private land claims (26 Stat. at L. 854, chap. 539), and therefore is beyond the reach of judicial cognizance.

"The duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the government. . . . . To the extent only that Congress has vested them with authority to determine and protect such rights can courts exercise jurisdiction. Where, therefore, a tribunal of limited jurisdiction is created by Congress to determine such rights of property, a party seeking relief must present for adjudication a case clearly within the act, or relief cannot be given."

Again, from the same case, on page 174, the court said:

"Did the fee to lands embraced within the limits of the pueblo and intended for community use continue to remain in the sovereign or did they pass to the pueblo?

"The general subject was much considered in United States v. Santa Fe, ... and it is said: 'It cannot be doubted that under the law of Spain it was necessary that the proper authority should particularly designate the land to be acquired by towns or pueblos before a vested right or title to the use thereof could arise.' . . . . .

"'The Kings, the fountains of jurisdictions, are the owners of all the terminos situated in their kingdoms, and as such can donate them, divide or restrict them, or give any new form to the enjoyment thereof, and hence it is that the pueblos cannot alienate their terminos and pastos without precedent royal license and authority. . . . . 'There is nothing whatever designated by law as belonging to towns, other than that which by royal privilege, custom, or contract between man and man, is granted to them, so that although there be assigned to the towns at the time of their constitution a territorio and pertenencias which may be common to all the residents, without each one having the right to use them separately, it is a prerogative reserved to the princes to divide the terminos of the provinces and towns, assign to these the use and enjoyment, but the domain remaining in the sovereigns themselves.'"

The above is a quotation from Elizondo's Practical Universal Forense, vols. 3 and 5.

And the court further said:

"And it was then observed: 'Moreover, the general theory of the Spanish law on the subject indicates that even after a formal designation, the control of the outlying lands, to which a town might have been considered entitled, was in the king, as the source and fountain of title, and could be disposed of at will by him or by his duly authorized representative, as long as such lands were not affected by individual and private rights. This is shown by the quotation from Elizondo, already made. The provisions of law 14, title 12, book 4, of the Recopilacion (2 White, New Recop. p. 52), which is reproduced in the margin, illustrate the absolute control thus exercised by the King of Spain over a subject.'

"The existence of this power of control and disposition as to municipal lands in the supreme Spanish and Mexican authority was shown by further references, and various acts of Congress were cited, as enacted in view 'of this state of the Spanish law and the unquestioned power lodged in the King of Spain to exercise unlimited authority over the lands assigned to a town and undisposed of and not the subject of private grant, *to all of which rights the*

United States succeeded as successor of the King of Spain and the government of Mexico.'

"'So, also,' said the court, 'it may well be supposed that it was upon this aspect of the imperfect nature of rights in land claimed by towns in territory formerly owned by Spain and Mexico, and the long established construction of such rights evidenced by the foregoing acts of Congress, which caused this court, speaking through Mr. Justice Field, in Grisar v. McDowell, 73 U. S. 6 Wall. 373, to say: "Even after the assignment, the interest acquired by the pueblo was far from being an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require their possession of the fee. The interest amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue for other public purposes. And this limited right of disposition and use was in all particulars subject to the control of the government of the country."'"

Here ends the quotation from Grisar vs. McDowell, and the court continuing, said:

"Although the particular question arising in the foregoing case was whether the Spanish law, *proprio vigore*, conferred upon every Spanish villa or town a grant of 4 square leagues of land, yet its disposition involved the same considerations as those presented on this record, and we regard its reasoning and conclusions as decisive here.

"Under the laws of the Indies, lands not actually allotted to settlers remain the property of the King, to be disposed of by him or by those on whom he might confer that power. As Mr. Hall says (chap. 7, sec. 122): 'The fee of the lands embraced within the limits of pueblos continued to remain in the sovereign, and never in the pueblo as a corporate body.' Subsequent decrees, orders, and laws did not change the principle."

From these authorities, it appears that the United States succeeded to the Mexican government as to all of the lands within the ceded territory that still remained public lands, and unappropriated by anybody to any extent, and even where there had been grants, perfect or imperfect, or rights of any kind, or licenses issued, whatever may have been the extent of the title left in the Mexican government, also passed to the United States. That as to the lands within the pueblos which had not been allotted to private parties, the title was in the Mexican government and passed to the United

States. And such rights as the pueblos did acquire from the government, even when the title was perfected, they held in a sort of trust to convey to the inhabitants, and this is the view which the Supreme Court of this State has taken with respect to the waters. There were certain things which were common to all the inhabitants, and included among them were the fuentes or springs of water appropriated to supply the town; ejidos, which were the commons surrounding the town, the fields, pastures and waters, salt springs and places for watering cattle. And there were lands devoted to churches and propios, which were generally lots fronting on the plaza and rented for stores, shops, etc., and the rents were for the use of the pueblo. That these were not common in the common law sense, and were communal property subject to be administered by the pueblo authorities, and that the waters of all the rivers, under Spanish and Mexican rule, were public property, to be administered and distributed for the use of the inhabitants, which were sometimes done by the pueblo authorities outside of the pueblo. In that sense the water belonged to the nation, and could not be acquired from it by condemnation, and it would seem to follow, as a matter of necessity, that when the pueblo was organized under the laws, a sufficiency of this water for a pueblo was appropriated to it. The country was arid. The population was almost wholly agricultural, and, said the court, as "we have seen, the waters were held by the pueblo, subject to the duty of distributing the same in the public interest."

They further said, in the case about to be cited, that they did not think this was a mere political power which could be revoked at any time so as to deprive the settlers who had been induced to become inhabitants of the pueblo of it.

Vernon Irrigation Co. vs. Los Angeles, 106 Cal. 237, and see especially pp. 244-250.

But all this law is taken from Alveres, vol. 2, p. 12, and which is shown to be the law of Castile, (see 106 Cal. 246), and the documents furnished in the case, which were substantially the same as

those presented in the case now before this court, and from the case of Lux vs. Haggin, 69 Cal. 255.

Leaving this matter for the present, it is sufficiently established that the United States succeeded to all of the rights which the Mexican government still possessed and retained in these lands, both in and out of pueblos. It is thoroughly established that the United States, as the owner of lands through which innavigable streams flow, is a riparian proprietor, and entitled to all the rights in the waters so flowing, that any other riparian owner is.

Van Sickle vs. Haines, 7 Nev. 249, 256-257; and see particularly the opinion delivered on the petition for a rehearing.

In that case it was said that it is a proposition universally admitted that the United States is the unqualified proprietor of all public land to which the Indian title has been extinguished. (7 Nev. 261). That on the sale of the lands by the United States the patent transfers to the purchaser, the entire legal estate and seisin to as full an extent as the government held them. (Id. p. 262). And having the power of disposal and protection, Congress alone can deal with the title, and no State law, whether of limitation or otherwise, can defeat it; (id. pp. 262-263).

And being the absolute owner of the soil, the source of all title thereto, and entitled to all remedies for its protection and preservation which are given to any individual owner, that it certainly could not be maintained that it is not equally entitled to anything which is naturally such an inseparable incident to the land, that it is frequently spoken of as a part of the soil itself. Such an incident is a natural water-course. It passes by deed of the soil without mention, and forms as marked a feature of the land through which it passes as the trees upon it or the vegetation which it nourishes (id. p. 264). That land, in its legal signification, comprehends the pastures, woods, moors, waters and marshes, as well as the soil or earth, and that the right of private property in a water-course is derived, as a corporeal right or hereditament from, or is embraced by, the ownership of the soil over which it naturally passes (id. p. 265).

That the right is not an easement or appurtenance, but is inseparably, annexed to the soil, and is parcel of the land itself, and the right to flowing waters is now settled to be a right incident to property in the land (id. pp. 266-267). That being an incident to the soil, the United States, having a complete and absolute ownership of the soil, owns its incident, or that which is a part of it, and no state court has any authority to hold that such an incident does not attach to the land belonging to the United States (id. pp. 267-268). And, said the court, "it may well be argued, and indeed it can be maintained, with as much plausibility, that it has not the right to the growing timber upon it, which is not more a feature of the soil itself than a natural water-course running through it."

Id. p. 268.

In Howell vs. Johnson, 89 Fed. 556, 558, the court said:

"The legislative act of Wyoming was only a condition which brought the law of Congress into force. The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein, or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell and grant the same or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper."

Again, "The federal government is not restrained in the disposal of its lands by state law. Its laws in this line apply to the lands in one State as well as another. It has made grants of land extending through several States. The State governments cannot restrict it in the primary disposal of its lands. If it may sell and dispose of its land as it may deem proper, there is no reason why it may not sell a part thereof as an incident thereto, such as the use of water flowing over the same. That it has the same right as any real estate proprietor would be self-evident."

Id. pp. 558-559.

In Union Mill & Mining Co. vs. Ferris, 24 Fed. Cases, case No. 14,371, the court said:

"It is also claimed that the act of Congress of July 26, 1866, confirms the right of defendant, acquired by priority of appropriation. We consider it to be entirely clear that before the title to these lands was acquired from the government of the United States, no occupancy or appropriation of the water by either party, no State or Territorial legislation, or rule of decision established by the State courts in controversies between occupants of the public land, without title from the government, can in any manner qualify, limit, restrict or affect the operation of the *government patent;* that the government has a perfect title to the public land and an absolute and unqualified right of disposal; that a stream of running water is part and parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as incident to the soil passes to the patentee, who can be deprived of it only by grant, or by the existence of circumstances from which it is the policy of the law to presume a grant; that the government, as proprietor of the land through which a stream of water naturally flows, has the same property and right in the stream that any other owner of land has, be it usufructuary or otherwise, and that a statute of limitations does not run against the United States.

24 Fed. Cas. p. 595.

In Cruse vs. McCauley, 96 Fed. 369, 373-374, the same doctrine is announced.

And in Sturr vs. Beck, 133 U. S. 541, 33 L. Ed. 761, 764, this court said:

"The right of the riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters, is a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent is not denied. Nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor or a prior appropriator as between himself and Sturr when the latter undertook to locate his alleged water right."

And in that case it was held that lands could not be said to be "public lands" after they have been entered under the homestead laws, and that if no appropriation of the waters of a stream flowing through those lands has been made prior to that entry, none can be made after, as against the homestead claim; and when the government has ceased to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded, and as the riparian owner has the right to have the water flow *ut currere*

solebat, undiminished except by reasonable consumption of upper riparian proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect.

And see further as to the rights of riparian owners, Indianapolis Water Co. vs. American Straw Board Co., 53 Fed. 970, 974-976.

These authorities might be extended *ad infinitum*, but we have cited enough of them to show what the rights of riparian owners are, and that the United States government is, as to the innavigable streams, such owner, and that a patent from the United States government passes the land, with all of its incidents. And this doctrine is fully established in this State.

In Lux vs. Haggin, 69 Cal. 255, 394, the Supreme Court said:

"By our law the riparian proprietors are entitled to the reasonable use of the waters of the stream for the purpose of irrigation."

And that the riparian rights were protected by the statute of April 13, 1850, adopting the common law of England, not the civil law, nor the "ancient common law" of the civilians, nor the Mexican law. And that the possessory rights of occupants of portions of the public lands, or of waters thereon (recognized by the California courts), are protected by the common law.

69 Cal. 379-380.

That these rights are not affected by the provisions of the Civil Code, as is shown by section 1422.

id. p. 368-370.

Nor was the common law as to riparian rights abrogated by certain statutes of California applicable to a district of country within which was the county of Kern.

id. 361.

And that since the admission of California into the Union, the United States has been the owner of all innavigable streams on the public lands of the United States within our borders, and of their banks and beds, a grant of public land by the

United States carries with it the common law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment or title.

id. 336.

And that since the admission of California into the Union the public lands of the United States are held, as are the lands of private persons, except that they cannot be taxed by the State, nor can the primary disposition of them be interfered with.

id. 335.

The acts of Congress, too, which are frequently referred to in these decisions, are of themselves an assertion of the United States' title to these innavigable waters. The act of July, 1866, whereby rights which had been acquired to the waters of innavigable streams by prior appropriation, and the same had vested and accrued, etc., did undertake to confirm rights which had been acquired by appropriation of such waters, and for the very reason that such appropriation was ineffective against the United States government, as all these decisions have shown, and that act has been construed by the Supreme Court of the State of California as a grant of the rights therein ennumerated by the United States.

Thus, in Smith vs. Hawkins, 110 Cal. 122, 125, the court, after saying the plaintiff's predecessor in interest had appropriated water by means of his ditch and conveyed it over and across the land of the defendant, which at the time of the appropriation, was a part of the public domain, and that the rights of the rival claimants and proprietors *as between themselves*, had for a long time been recognized and adjusted by mining customs and adjudications in the State courts, it was not until 1866 that they met with federal cognizance and sanction, and that in that year the United States conferred upon those who had, or might thereafter appropriate, water and conduct the same over the public land, a license so to do, and provided that all the patents granted or pre-emptions or homesteads

allowed should be subject to such vested and accrued water rights, or rights to ditches and reservoirs as might have been acquired under or recognized by the act, said:

"An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continues to be a part of the public domain, is a licensee of the general government; but when such part of the public domain passes into private ownership, it is burdened by the easement granted by the United States to the appropriator who holds his rights against this land under an express grant. In this essential respect, that is to say, in the origin of the title under which the servient tenement is subjected to the use, one holding water rights by such appropriation differs from one who holds water rights by prescription."

Now, from these decisions we deduce the following conclusions:

1. The United States government succeeded to all the right, title and interests of the Mexican government, in all the lands within the ceded territory.

2. The United States government is as to the lands through which an innavigable stream flows, a riparian owner, vested with all of the rights and incidents which attach to that condition.

3. That such waters flowing through lands are part and parcel of the land itself.

4. That a grant by the United States government of such lands, carries with it all the rights which the United States had in the lands, including the rights of a riparian owner.

5. No State can, by any law or any decision of the court, deprive any party of the rights thus acquired from the United States government, nor limit nor qualify nor restrict those rights in any way; for any such act is, to the extent that it goes, a deprivation of the property which he has acquired from the United States. Furthermore, such State action interferes with the disposition of the public lands which it is not competent for any State to do, and especially California, which was forbidden in the very act of admission, to interfere.

6. Since the act of July, 1866, lands through which a stream of water flows, may be effected, so far as the riparian rights are con-

cerned, by an appropriation made under the sanction of the laws of Congress.

7. That these rights of appropriation, however, under the act of Congress of July, 1866, are limited to the time when the lands are public lands, and in cases of homestead entries at least, and probably pre-emption claims, they cease to be such at the time of entry, under the homestead law, or filing the declaratory statement under the pre-emption laws, and such homestead or pre-emption claimant's right to be secure against appropriation of the waters affecting his riparian rights, is not postponed to the time of the issuance of the patent, or of making the final payment.

We may add one further principle which has been established, that where one is claiming under a Spanish or Mexican grant, which grant is confirmed and a patent issued, the title will take effect by relation as of the date of the presentation of the petition of the patentees to the board of land commissioners.

Moore vs. Henderson, 13 Cal. 478, 488;

Touchard vs. Crow, 20 Cal. 150, 161.

In this case it was said that the patent, following the confirmation, took effect by relation at the date of the presentation of the petition to the land commissioner, on the 24th of February, 1852. And the deed of the United States, it is to be regarded, as far as all intermediate conveyances of the petitioners are concerned, as having been executed at that time.

Clark vs. Laughlin, 21 Cal., 221;

Behler vs. Platt, 52 Cal. 550, 552;

McDonald vs. McCoy, 121 Cal. 55, 67;

Landes vs. Brant, 10 How. 348; 13 L. Ed. 449, 460;

Beard vs. Federy, 3 Wall. 478; 18 L. Ed. 88, 92.

We quote the following from that case at the page last mentioned:

"The position of the defendants is that as against them the patent is not evidence for any purpose; that as between them and the plaintiffs, the whole subject of title is open precisely as though no proceedings for the confirmation had been had, and no patent for the land had been issued. Their position rests upon a misappre-

hension of the character and effect of the patent issued upon a confirmation of a claim to land under the laws of Spain or Mexico.

"In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim deed, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners."

It therefore follows that the predecessors in estate of the plaintiffs in error were, by the patent issued, vested with whatever right, title or interest the United States had in these lands at the date of the filing of the petition for the confirmation of the several grants under which they claim. And if, at that time, the United States government had any rights in these lands as riparian owners, they became vested in them.

The first question, then, is what were the rights of the predecessors of plaintiffs in error, or of the United States in these lands and the waters of the Los Angeles river which flowed through them at that time? We are now laying out of the case any question of the Mexican law of pueblos. We do not find this question discussed in any opinion of this court, but it has been considered in the Supreme Court of California, and several different times. The case wherein the laws of Mexico with respect to the waters flowing through the lands of that government, was most elaborately considered, was the case of Lux vs. Haggin, to which we shall presently turn. All of the other cases either do, or they claim to, follow the doctrines which were announced in that case. In the Vernon Irrigation Company vs. Los Angeles, 106 Cal. 237, 248, they say that the view adopted there was adopted by this court in Lux vs. Haggin, 69 Cal. 255.

In this present case the Supreme Court of California said that while the proposition involved was not the same as in the case of the Vernon Irrigation Company vs. Los Angeles, 106 Cal. 237, it was governed by the same principle, and that that case was authority, if authority were required, for the conclusion upon this point.

124 Cal. 639.

And in this case it was also held that the legislature of California could grant nothing to the City of Los Angeles which belonged to others, and the rights of the city, as successor to the pueblo in the land of riparian proprietors holding under Mexican and Spanish grants, cannot exceed the rights of the pueblo itself.

id. 639.

The case, then, which we are to consider, is the case of Lux vs. Haggin, 69 Cal. 255. This case extends from page 255 to 454. We shall quote only that portion of it which deals with this subject which we now have under consideration. That discussion begins on page 313, where it is announced as the fourth subdivision of the discussion.

"IV. By the law of Mexico the running waters of California were not dedicated to the common use of all the inhabitants in such sense that they could not be deprived of the common use."

With this caption, Mr. Justice McKinstry, delivering the opinion of the court, proceeded to discuss the Mexican law. He concedes that if riparian owners have any rights in the waters (or in the lands themselves)it is such as is created or recognized by the law of the land, and that it was equally true that every inhabitant of a State or district did not possess a potential right inherent in his habitancy, to divert so much of the waters of a stream as he might have occasion to employ. That the whole matter depended upon the law of the country, written or unwritten. In other words, neither the riparian right of the common law, nor the supposed common right of all inhabitants within the water shed, to use the waters of a stream were founded in the nature of things or in the natural law, but whatever may have been the rights of either class of persons, they must be found in the law of the land, written or unwritten.

id. 313.

Mr. Justice McKinstry first states the position of the counsel for the respondent, which was that the fundamental principle upon which all the laws of the former governments of this territory upon this subject of waters and their uses were based, were that the flow-

ing waters of the streams and rivers of the country were dedicated to the common use of the inhabitants, subject to a legislative control which they considered the equivalent of the exercise of the police power of the State. That he understood this claim to mean that the inhabitants of the territory, or at least occupants of land in each valley or water shed capable of irrigation from the stream flowing in it, had under the Mexican law, a *vested interest in the common use for irrigation and like purposes* to which the waters were dedicated, which could not be taken away by the legislative power; that the dedication continues to the present hour; and that the State of California had no power to restrict the use to riparian proprietors; that the statute of 1850 adopting the common law as the rule of decision was not to be construed as an attempt to so restrict the use, and if it must be thus construed, it was to that extent invalid since the power of the state was limited to the mere regulation of the common use; that this power was attempted to be supported by the case of New Orleans vs. United States, 10 Peter 662. Mr. Justice McKinstry then proceeds to consider what this Mexican law actually was, and after saying that the case of New Orleans against the United States, *supra*, did not sustain their contention (id. 314-315), he shows:

1. That in the Mexican law the things which, by natural law were common to all, were, air, running water, the sea, and as a consequence the shores of the sea (id. 315); that those things known as "*bienes communes*," which, not being the property of any, pertained to all as to their uses, as the air, rain water, the sea and its beaches, and as to "*bienes publicos*," they were those which, as to property, pertained to the people or nation, and as to their use, to all the individuals of the territory or district, such as rivers, shores, ports and public roads.

id. 315.

That by the Mexican law the property in rivers pertained to the nation, the use to the inhabitants.

id. 316.

That the common use of the waters, *it would seem*, existed only while they continued to flow in and constituted a portion of the river. But under the Mexican law an exclusive use of the parts or whole of the waters of the river might be acquired by individuals.

id. 317.

And after quoting from Bowyer's Com. on the Civil Law, to the effect that those things, the exclusive appropriation of which, either to a portion of mankind or to certain individuals, or purposes, is unnecessary for the objects of the social state, must remain, by the natural law, common to all men, and as an illustration, that air and light cannot be brought under the power of any one person, he quotes further thus:

"Upon these principles, running waters are held by the Roman *juris-consulti* to be common to all men. But it also follows that this decision does not apply to waters, the appropriation of which (to the exclusion of the common enjoyment) is necessary for a certain purpose, as water included in a pipe or other vessel for certain uses. The common right to the use of running water, therefore applies only to those cases where the quantity of water is so great that its entire exclusive appropriation is not necessary, having regard to the general objects of the institution of property. . . . . Thus running water is capable, indeed, of a qualified appropriation as property, but subject to a common right by natural law where it is capable of being fully enjoyed without exclusive possession."

id. 318-319.

He quotes from the Mexican Civil Code of 1870, where it is provided that the property in waters which pertains to the state does not prejudice the rights which corporations or private individuals may have acquired over them by legitimate title, according to what is established in the special laws respecting public property. The exercise of property in waters is subject to what is provided in the following articles.

id. 319.

And he says:

"If, as suggested by counsel, the presumption is that the provisions of the code are declaratory of the pre-existing law, the right which could be acquired under the laws, to the separate use of the portions of a stream, constituted an exclusive usufruct of the nature

of private property, which did not and could not co-exist with the common use of such waters by all. As we have seen, running water is capable of appropriation as private property, independent of any common use, where the quantity of water is so small as to be incapable of being fully enjoyed without exclusive possession. The exclusive appropriation is put in opposition to the common use."

id. 320.

The Mexican government prohibited any diversion or obstruction of the waters of a river by riparian proprietors or others, which should interfere with the navigation.

id. 320-321.

But this is the rule of the United States as well as of Mexico.

On page 321, he further says:

"Interference with the appropriate common use of innavigable rivers was not thus absolutely prohibited by the Mexican law. The common use of the waters of such rivers by all who could legally gain access to them, continued only while the waters legally flowed in their natural channel. And the power of determining whether the public good—the purposes for which the social state exists—demands that the use of the whole or portions of the waters should pass as an exclusive right to one or a class of individuals remained in the sovereign. Whether this power was an incident to the ultimate domain or right of disposing of the property of the state, or is to be referred to some other source or principle, the Mexican government employed the power of permitting the diversion of waters from innavigable rivers by those not riparian proprietors, upon such terms and conditions, and with such limitations, as were established by law, or by usages and customs which had the force of law. That government saw fit to concede private rights to the exclusive use of the waters of such streams. It had power to do this even if the consequence should be the *entire deprivation of the common use.*

"It may be said that the Mexican laws which provided for such concessions to individuals or corporations did not provide for grants to such persons, but were themselves a recognition of a right in all to a use of the waters. But a system which provided for the mode of acquisition of private, separate, and exclusive rights, by individuals or corporations, cannot be said to be merely in regulation of a common use. . . . .

"Those who appropriated and diverted the waters of an innavigable river in accordance with the laws obstructed *pro tanto* its common use. Nevertheless, they acquired an exclusive right to the

use of that which they diverted, because, if they complied with the established conditions, their rights were acquired under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use.

"No one of such had any right in or to the water until he had complied with the conditions which authorized him to appropriate it. Every one of such who complied with the conditions, and appropriated water, acquired a vested right in such water, at least while he continued to use it, except in the single case where he acquired a right merely conditional, under laws which reserved the power in the agents of the state or municipality to deprive him of it without indemnification."

id. 322-323.

And then, says Mr. Justice McKinstry:

"It may be conceded that one who had acquired the right to the exclusive use of a portion of the waters of a river under the Mexican regime could not be deprived of his right by a law of California. But can it be said that all of the inhabitants of a state or of a valley through which a stream flows, have such a vested right in the use of the waters which some of them (on performance of the conditions prescribed by Mexican law) might have appropriated, but never did appropriate?—this on the theory that the waters had been dedicated to the common use of all. It would be a dedication never accepted by those to whom it was made, and a dedication to a common use which could never be enjoyed in common.

"Those who had not appropriated waters in the mode prescribed had no right or property in the water or its use, of which they would be deprived by subsequent legislation conferring the *use of the waters on riparian proprietors alone*. And it would seem very clear that those who actually appropriated water, in compliance with the conditions prescribed, acquired a proprietary interest of which they could not be deprived—at least while they continued its use—except on sufficient indemnification."

id. 322-323.

After much more than is above stated, he says:

"Thus the property of the nation is in the river and its bed, while it is the bed of the river; the common use continues while the water is the water of the river. But a private right to the exclusive use of the waters could be acquired under the Mexican law by prescription, or on compliance with the established conditions; and the general property of the nation in running waters did not prejudice such special private rights.

"Conceding the provisions of the Civil Code of 1870 and 1884

to be declaratory of the law as it existed when California was ceded to the United States, they do not confer nor recognizze any inherent vested right, enforceable in the courts, *in others than riparian proprietors*, to the use of any portion of the waters of a stream, nor any right, except as to those who actually appropriate waters in the manner and on the conditions prescribed by the laws."

id. 324.

And this we understand to mean that the Mexican government notwithstanding this supposed common use of the waters of the streams, did permit persons, by complying with certain conditions prescribed by the Mexixcan laws, to acquire a private property in a portion of those waters, and the right to the exclusive use of it, which continued at least as long as he continued to use it. But this was not a right of property until the conditions were complied with, and the right to the use had thus become vested. Now, grant that to be so, and there appears to be no great deal of difference between the law of Mexico and the law of the State of California, including in that term the laws of the United States as applicable thereto. The laws of California, although these innavigable streams were, so far as they flowed through the public lands of the United States, the property of the United States in a certain sense, that is, that that government had all the rights of a riparian owner as to such waters, did, long prior to the act of 1866, recognize rights which had been acquired by appropriation, and in 1866 the government of the United States sanctioned and recognized these rights when they had vested and accrued under the laws of the state. But this right *to acquire* the exclusive use of a portion of the waters of a running stream in this state, under the acts of Congress and the laws of the state, is dependent upon complying with the conditions upon which that right is to accrue. And it does not constitute any vested right in those waters until it does accrue. If it accrues by virtue of a compliance with the local laws under the act of 1866, before another has appropriated the lands through which the stream flows, such other will take the title to the land from the government of the United States, subject to such vested and accrued right. But if one who has had merely the right to acquire such a right, has not ac-

quired it, if his whole right consisted of the mere license of the government to go and perform certain acts and thereby acquire a right, which acts he has not performed, prior to the time when the title has passed from the United States, or another has initiated a right, then he cannot acquire it at all. The owner of the land has then the right that the water shall continue to flow as it was accustomed to flow, and while the laws of Mexico may, as Justice McKinstry suggests, have authorized the acquisition by appropriation of rights to the exclusive use of portions of the waters by non-riparian owners, yet as to all persons who had not availed themselves of this license before the title passed from the Mexican government to the United States government, the right ceased. The government of the United States became the riparian owner, succeeded to all the rights of the Mexican government in the lands, and no one who had not acquired any right under the Mexican government could, by virtue of Mexican laws, establish any such rights against the United States. Therefore, we maintain that when the patent of the United States issued to the predecessors of the plaintiffs in error, they acquired the title to the land, and all which was incidental to it, or part and parcel of it, as against all the world except such as may have, anterior to the vesting of the title in the United States, acquired a right to the use of some such incident or part of the estate. As no one appears to have made any such acquisition in this case, it is submitted that by those patents and the conveyances from the patentees to the plaintiffs in error, by divers mesne conveyances without limitation upon their title, and vesting the property in them in fee simple, they acquired title to the lands and all the rights of a riparian owner, and if there is any person who has any right paramount or superior, or prior to the right of plaintiffs in error in this case, it is the City of Los Angeles, and it alone, and it only by the asserted superior and paramount right of a Spanish or Mexican pueblo. The sole question, then, under the point which we are now discussing, is, was there any such right in the pueblo of Los Angeles? Justice McKinstry begins the discus-

sion of this question, in Lux vs. Haggin, 69 Cal. p. 326. He says "the laws of Mexico relating to pueblos conferred on the town authorities the *power of distributing*, to the common lands and to its inhabitants, the waters of an innavigable river on which the pueblo was situated."

This doctrine we do not object to, and we think that it is probably sustained by such citations as have been referred to in the various cases, and by other authorities which we have consulted. But the power of a municipality to superintend and control the distribution of water among its inhabitants is one thing, and the paramount title and right to the use of all the waters that may happen to flow into that municipality, is a totally different thing, and there is not anything that has ever been cited, that bears out that doctrine, even if we suppose that the various authorities which have been collated, correctly declare the law. We note here that while he refers to the Plan of Pitic, he says that whether it is or is not a scheme in all respects applicable to every pueblo created after the date, November 14, 1789 (as is claimed by counsel) *it may be conceded* that the provisions therein contained were, in substance, those having force in the pueblos established in California while it was a part of the territory of Mexico.

id. 326.

But he does not say that the scheme was applicable to all such pueblos, nor that any of its provisions were in force in the pueblos established in California. He is simply conceding the latter for the purpose of the argument. He then considers that plan, and quotes the 19th and 20th sections thereof. The sections are too long to quote. They simply establish certain regulations concernnig the construction of ditches, the appointment of officers to see to the distribution, and for the distribution, but there is not one word in them that declares that the pueblo has any prior or paramount rights to any other person, and there is nothing in them in the least inconsistent with this common right to use the waters of the streams. They are providing for the manner of using therein,

but not attempting to declare what the nature of the right is. And on page 329, while still considering this question, Mr. Justice McKinstry says:

"Thus the legislature has provided for the mode and manner in which shall be exercised the trust of distributing the waters by the city, the successor of the pueblo of Los Angeles."

id. 329.

But a provision of a legislature for the mode and manner of exercising a trust, or of distributing waters to the inhabitants of a city, determines nothing at all as to the rights of the city in the waters, much less the rights of the inhabitants therein.

We quote another passage from the same page:

"The inhabitants of the former pueblo who were using water when this territory was transferred to the United States had not acquired a vested right to any particular quantity of water. And the occupants of lands within the city, the pueblo's successor, are beneficiaries only to the extent that they are entitled to the use of such water and at such times as accords with the laws regulating the public and municipal trust."

id. 329.

"Each pueblo was *quasi* a public corporation. By the scheme of the Mexican law it was treated as an entity, or person, having a right as such, and by reason of its title to the four leagues of land, to the use of the waters of the river on which it was situated, while as a political body it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred."

id. 329.

Now, here Mr. Justice McKinstry was mistaken. This court has had this question under consideration recently in the case of the United States vs. Santa Fe, 165 U. S. 675, 41 L. Ed. 874. And though the plan of Pitic was before the court (41 L. Ed. 882) it was here determined that a pueblo was not entitled, as of right, to four square leagues of land. Indeed the second instruction in that plan itself was to the effect that there might be granted to the town in question four leagues of bounds or territory in a square or in lengths, as shall be adapted to the better location, etc.

id. 882.

And furthermore, it was decided in the Santa Fe case that they had no rights at all, or no title to the land without the grant, and that that might be 4 square leagues, or more or less, and frequently was both more and less. The discussion, however, of the rights of the pueblos and their inhabitants to the use of waters continues in the 69th California Reports, down to, and including, page 334.

But we fail to find any citation from any authority that bears out the proposition that these pueblos had a superior, paramount and prior right to the use of the waters. And indeed, the utmost that Justice McKinstry says is that "it *seems* that the pueblo had a preference or prior right to consume the waters *even as against an upper riparian proprietor.*" The common use here spoken of is the use for the benefit of the community or inhabitants of the pueblo, whose interests as a whole were to be considered in the distribution of the waters by the officers of the pueblo. It is not necessary here to decide that the pueblos had the preference above suggested, nor is it necessary here to speak of the relative rights of two or three municipalities on the same stream."

id. 331.

No such paramount right, therefore, is deducible from any of the laws which are here referred to, even if they had any application to this country. But in truth there is nothing more difficult than to ascertain what the laws of Spain and Mexico with reference to the title to real property were. Mr. Joseph M. White, who made a collection of the laws, charters, etc., of the governments of Great Britain, France and Spain, and the laws of Mexico and Texas, and the Institutes of the Civil Law of Spain, in the introduction to his work entitled "Land Law in California, Oregon, Texas," etc., and which he speaks of in the introduction as the "new Translated Recopilacion of the Laws of Spain and the Indies, and of the Colonial Charters and Local Ordinances of Great Britain, France and Spain," speaks of the compilation as being almost the only book referred to in the Supreme Court . . . upon the many im-

portant questions *of complicated foreign law and perplexed Spanish Colonial Jurisprudence.*

Introduction, p. 4.

At another place, he says that at one time such was the confusion in the Codes of Castile and the difficulties in their administration, that they were entirely abandoned and the Roman law resorted to as the rule of decisions.

id. 10.

Indeed, in this work itself is sufficient evidence that there were almost as many different regulations as there were provinces to govern. We have not been able to discover that he has ever mentioned the plan of Pitic. He quotes many legal regulations that seem to recognize the rights of settlers to the right to the use of waters for irrigation. Thus, in the Laws and Decrees of Coahuila and Texas, vol. I, p. 436, in Article 22, is prescribed the amount to be paid by new settlers to the state as an acknowledgment for each sitio of grazing land, and considerable more is to be paid for each labor, that is, irrigable, than for one that is not irrigable.

Another article, 24, requires the Mexicans who purchase lands to cultivate them, and allowing the aforesaid condition, the price of each sitio shall be one hundred dollars for grazing land; one hundred and fifty for tillage land not irrigable, and two hundred and fifty for irrigable tillage land.

Art. 24, p. 437.

He speaks of the distribution of lands in the regulations for Austin's Colony to the colonists, for the formation of villages, towns, etc., and says that a distinction shall be made between grazing lands destined for the raising of stock, and lands suitable for farming or planting on account of the facility of irrigation.

id. 589.

He refers again, in article 12, page 604, to the distinction which must be made between grazing and farming land, with or without the facility of irrigation.

Passing to volume 2 of this work, in a letter written by him, he speaks again of the difficulties of the task imposed upon him; of the

magnitude of the interests involved; the nature and policy of the Spanish government; the obscurity of the laws of Spain; and the want of access to books and documents illustrative of this portion of Spanish jurisprudence.

id. vol. II, p. 12.

Again, on page 13, he says:

"It was only among the more recent of these ponderous masses of manuscript that I found any reference to the laws or ordinances of the country from which the titles in controversy were derived. In general, the cases followed each other in the order in which they were decided, without system or classification. Seldom could any uniform rules of decision be extracted from them, and the correctness of the few adopted was more than questionable, since they frequently consisted of common law principles applied to rights arising out of a different system of jurisprudence, and under a government whose organization, forms, and policy have little resemblance to those, the maxims of which were thus made tests of excellence, or standards of comparison."

He is there referring to the reports of the various boards of commissioners, but he further says:

"In the hope of procuring some light upon the subjects of this compilation, various histories of Spain and of her colonies have been consulted. From these sources little information can be gained without reference to the law of real property, or the organization, powers and duties of the local authorities.

"The jealousy of the mother country seems for a long time to have shrouded her colonial policy in *studied obscurity*, and when, at a late period, her provinces were opened to the inquiries of intelligent strangers, this branch of their history attracted little attention."

Vol. II, pp. 13-14.

At page 47, Vol. II, he speaks of a law or ordinance to the effect that "after having laid out a sufficient quantity of land for the liberties of the town . . . conformably to what is provided in that behalf, the persons authorized to make the discovery and settlement shall lay out reservations," etc., "and if there be any land suited for irrigation it shall also be distributed by lot in the same proportion to the first settlers, and the remainder shall remain vacant that we may grant them to new settlers."

At one place he directs the viceroys and presidents of boards

of the Indies which are already discovered to grant them in his name lands and waters, taking into consideration the situation of the land.

id. 50.

At another place, "We have ordained that pastures, mountains and waters shall be common in the Indies."

id. 56.

But without following him further, we say again, there is nowhere any mention made either of any paramount right in the towns or pueblos, nor anything from which such a conclusion can be deduced. And if such right is to be found anywhere, it is in the papers which were introduced in evidence in this case. As to these, whatever may be the law of Mexico governing the property rights of the parties to this transaction, or having any effect upon those rights; it is a part of the law of the United States, and will be taken judicial notice of by this court. This has been so often decided that it is unnecessary to cite the cases. We do not mean to give any extended examination to these papers for the reason just suggested. Whatever effect they may have upon this question is judicially known to this court. The papers thus introduced will be found in the transcript, commencing on page 89. The first does not appear to have any significance except as a step in founding the pueblo of Los Angeles. The second is of the same character, and directs the governor to establish the presidio of Santa Barbara, and the two pueblos, one of which is Los Angeles, with a view to land and water for cultivation. The third is a communication from the governor to the viceroy concerning the establishment of these pueblos.

Trans. pp. 89-90.

This latter speaks of the fertility of the soil and the abundance of water for irrigation.

id. 90.

The fourth is a communication from the commandant general to the governor of California, concerning the establishment of these towns, and it recites the setting apart by him to each settler, besides

the lot on which he erected his house, certain irrigable lands for the planting of one fanega of corn, etc.

id. 90.

The fifth is of a similar character, and directs that the lands capable of irrigation should be carefully examined, and a point selected for the erection of a dam which would insure the distribution of the water.

id. 90.

The sixth is the plan of Pitic, so-called. "The 6th section provides that within the four leagues assigned as the limits of each pueblo, all pastures, woods, water privileges, hunting, fishing, stone quarries, fruit trees and other privileges shall be for the common use and benefits of the Spaniards and Indians residing therein, and in its suburbs or villages."

But it might as well be claimed that all the stone quarries, pastures, woods, hunting and fishing, fruit trees, and other privileges that could be exercised anywhere within the Los Angeles river valley, was given over exclusively to these inhabitants, as to say that the water privileges were.

"Section 7 provides that the residents and natives shall enjoy equally the woods, pastures, water privileges and other advantages of the royal and vacant lands that may be outside of the land assigned to the new settlement, in common with the residents and natives of the adjoining and neighboring pueblos."

Section 19 we have already referred to, and it is set out in full in the opinion in Lux vs. Haggin, and it is a provision for the distribution of the water without anything that refers to the extent of the rights of the pueblo, or anybody else.

Section 20 is of the same character.

Section 24 vests the ayuntamiento with the power and authority to make, promulgate and enforce all necessary laws, rules and regulations, not contrary to the general laws for the government of the settlement.

Transcript, p. 91.

The seventh document introduced was an opinion of the attorney, or assessor, on the subject of the concession of land.

id. 91, 92.

And it directed, among other things, that the new settlers should enjoy, for the maintenance of their stock, the common advantage of waters and pastures, wood and timber, of the common forests and pasture grounds, which in compliance with the laws are to be marked out for every pueblo.

id. 92.

But let it be noted that the instructions which are there referred to is title 14, Article 8, for the political government of California, and regulation of the peninsula, approved by his majesty the 24th of October, 1781, and not the plan of Pitic at all.

The next recital is of the law of title, 17, book 4 of the "Recopilacion," which provides that the use of the grazing lands and woods and waters of the provinces of the Indies shall be common to all the inhabitants thereof, that they may enjoy them freely, with their cattle, etc.

Again, the allotting of tracts of land for cattle claimed by settlers in California, and proposed by the governor in his communication of Nov. 20, 1784, could not, nor should it, be made within the boundaries assigned to each pueblo, which in conformity to law 6, title 5, of the "Recopilacion," must be four leagues of land in a square or oblong body, according to the nature of the ground, because otherwise they would become private owners of forests, water, timber, wood and other advantages, so depriving their neighbors of these benefits.

Transcript, p. 92.

And this is said to be plainly at variance with the intention of the before-mentioned laws, and the express provisions of article 8 of the instructions for settlements of the Californias, according to which all the waters, pastures, wood and timber, within the limits of each pueblo must be for the common advantage. But, as we have said before, here again the writer of this document appears

to have been mistaken in regard to the laws for the establishment of pueblos. They were not limited to four square leagues, nor is it obvious what is meant by the result of not following directions here given, that they would become private owners of forests, waters, timber and wood. But the same document goes on to say that

"He recommends that the commandant general order the governor of the Californias, Don Pedro Fajes, that he allot each new poblacion four leagues of land, in a square or oblong body, as the nature of the ground will admit and that he shall not concede or grant any portion thereof for farms for the raising of cattle, in order that the woods, pastures, waters and other benefits be left in common for all the residents and settlers without any exercise of private domain or property therein. And that he grant, outside of the limits of the pueblos, and at a distance from the pueblos, missions and Indian villages, 'sitios' for farms and tracts for raising cattle, obliging the settlers to employ sufficient herdsmen, etc., to prevent damages, each settler to have no more than three 'sitios,' . . . . and that where there are no herds of cattle, concessions may be granted for the raising of sugar cane."

Trans., pp. 92-93.

And reciting other ordinances and instructions, but never the plan of Pitic. Among other things, recited title 14 of the royal decree for the government of this peninsula, providing the methods by which the lots and tracts of irrigable and dry lands are to be distributed, and the rules governing the raising of stock and cultivation of lands, etc., and to the end that the settlers near the pueblo of "Our Lady of the Angels" may live in quiet and peace, commissions the ensign don Jose Arguello, from the presidio of Santa Barabra, to proceed to Los Angeles and give formal possession to the settlers in accordance with the terms of said royal decree, of the lots and tracts of land heretofore assigned. That he should clearly define and designate what were public domains, viz., water, pasture, wood, etc., the settlers to accept their farms, etc., under this understanding, and to sign instruments to that effect, which he reports that he had done.

Transcript, p. 93.

And this is one of the documents which are supposed to have much significance, but in truth this reference to the waters, pastures and woods as being of the public domain is very frequent in the Spanish law, and means nothing more than Mr. Justice McKinstry said it did in Lux vs. Haggin, they remained free to be disposed of by the government, and license might be granted to the inhabitants in these waters, and unless the terms and conditions were complied with, no title would vest by such license.

Tenth, is the order of the commandant general for the direction of the captains and commandants in the distribution of lands in the pueblo, but we do not see that they have any effect on any question involved here.

From the provincial State Papers, Vol. XIX, in the years 1805-1815, beginning at page 956, is said to appear, under date of February 17, 1810, a report from Alvarado to Arguello, who was the commandante of Santa Barbara, that complaint had been made by certain citizens of Los Angeles that the R. R. F. F. of San Fernando had made a dam on the Cahuenga rancho, cutting off the waters of the river with which the town is provided, and that in consideration of the injury done to the town he sent a commission to examine into the matter, which made a report fully confirming the substance of the complaint.

Number 2 recites this complaint as to the erection of the dam on the river, and the damage it would cause to the farmers and other laborers of the pueblo, as it was the only water that supported them, and that he had appointed a commission to consult with him in the matter and hoped thereby to avoid an appeal to the superior authority.

Number 3 enclosed this communication to the Sergeant Alvarado, with instructions to deliver it and demand that the dam should be removed. Other communications were had, and the authorities of the pueblo produced evidence to show that the dam cut off the source of the waters for irrigation, thereby causing and threatening great damage and suffering, and the authorities of the mission de-

nied this, and claimed that the dam they used had been used by a former occupant for fourteen years, but they yielded all right to the same, and only asked permission to use sufficient water for irrigating a small tract of land necessary for the mission, with the precise understanding that in whatever time the least damage should be proved and caused to the settlers on account of a diminution of the water by them, the mission would cease its labors in that place, and in the meantime agreed to return all the water to the river after having used it for irrigation.

Transcript, pp. 94-95.

This is another one of the documents which has given great comfort to our adversaries, when in truth it is manifestly a dispute between a lower proprietor and an upper proprietor as to their respective rights, and the City of Los Angeles is not there claiming to be the exclusive owner of these waters, or of the paramount right to use them, but is charging that the effect of this dam is to cut off the water that should flow down the river, and that those living within the city were thereby deprived of the use of the water for irrigating their lands.The matter appears to have been settled amicably; there is nowhere in it a confession on the part of any one of this paramount right to the use of the waters, nor do we see what effect it could have if there had been. This was a use of the waters by the San Fernando mission and a controversy between two parties, neither of whom had anything to do with the plaintiffs in error or their predecessors, for although the Cahuenga is mentioned, it is the mission that the controversy is with, and they had nothing to do with the tract of land known as the Cahuenga.

Other papers follow, other controversies appear to have existed, but there is nothing in any of them upon which to found any such claim as is put forth here. For the other papers, see pages 95-100.

There have been controversies since the State of California was admitted into the union, and one of these was the City of Los Angeles against Baldwin, in which the city was putting forth her claim

to all the waters of the river, and Baldwin was claiming title to the waters by prescription, and the claim was sustained.

City of Los Angeles vs. Baldwin, 53 Cal. 469.

In all the controversies under the Mexican regime and since until this case was decided, there never was any assertion of such a right sustained by any tribunal.

On the other hand, so far as these plaintiffs in error are concerned, we do not deny that the City of Los Angeles possesses large and valuable interests in the waters of the Los Angeles river. We do not claim any rights so far as the Los Angeles river properly so-called is concerned, except the rights of riparian owners, and that this right extended to a tract of land of about 1400 acres, of which the 314 condemned here is a part. We do not deny the equal right of the city as a riparian owner. We do not deny that its interest is much greater than that of the plaintiffs in error. We do not deny that, for the purposes of providing the people of the City of Los Angeles with water for domestic uses, we should be compelled to permit the whole of Los Angeles river to flow down to the city, if necessary for that purpose, subject only to the equal right to water for domestic use of the settlers upon this land. In other words, that according to the law of riparian ownership, the domestic use is a paramount use, but after that, when it comes to irrigation, it is a secondary or a subordinate right; and here we are governed by principles of a different character. That which we object to is the complete subordination of all right of any sort of the plaintiffs in error in the waters of this river, until all of the uses which the City of Los Angeles sees fit to make of the water, whether for pleasure or profit, for the necessities, or comforts, or luxuries of the inhabitants of the city, have been completely satisfied, which means nothing more nor less than that we have no rights that the City of Los Angeles is bound to respect. And this, we say, is not sustained by either reason or authority, and the effect of the decision in this case was to deprive these plaintiffs in error of their property without due process of law.

V.

IF THE CITY OF LOS ANGELES HAD ANY PARAMOUNT OR PRIOR RIGHTS, THEY DID NOT EXTEND BEYOND THE LIMITS OF THE PUEBLO LANDS, NOR BEYOND THE LIMITS OF PUEBLO PURPOSES.

Under the last point we have endeavored to show that the City of Los Angeles had no prior or paramount right at all to the use of the waters of the Los Angeles river, either surface or subterranean, but if we are mistaken in this, we now submit to the court that that paramount right did not extend beyond the pueblo grant, nor did it exist for any other purposes than such as were established by the Spanish and Mexican law. It will be noted that in the opinion of the Honorable Chief Justice of the Supreme Court of California, he holds that this position is correct. The Chief Justice, after considering many other questions, said:

"We come now to another series of instructions given and refused relating to the rights of the plaintiff as the successor to the pueblo."

And after saying that this was one of the issues which, by agreement of the parties, was tried by the court, he says:

"The instructions given to the jury on this part are, therefore, to be regarded as embodying the findings and conclusions of the court upon that particular issue, and treated accordingly, the only question being whether the decision of the court with respect to the city's rights to the waters of the river were sustained by the evidence."

He refers then to instructions 3 to 6, given by the court, to which we had objected as being erroneous, and adds:

"It it still more strongly insisted that the court erred in refusing instructions 12, 13 and 14, requested by the defendants, which read as follows:"

Then follows the copy of the instructions refused, and which were to the effect that the ancient pueblo rights, whatever they might have been, were not attempted to be granted by the legislature to the City of Los Angeles except to the extent of 4 square miles, and could not have extended beyond 4 square leagues; that

the uses to which the pueblo was authorized to apply the water were such purposes as appertained to the Spanish pueblo under the civilization of those times, and did not extend to the cultivation and irrigation of parks, or the creation and maintenance of artificial lakes therein, or supplying waters for outfall sewer, and that the pueblo of Los Angeles had no paramount right to the use of the waters for any purpose as against the grantees of the Mexican government, under whom the defendants here claim; but the raising of stock, and tilling of the lands, granted by the Mexican government to these grantees, were as much parts of the policy of the Spanish and Mexican government as the founding of pueblos and promoting the progress of those towns. And rights to the use of water by the grantees of these ranchos for domestic uses, and stock and agricultural purposes, were protected by the laws and policies of those governments, as well as the interests of inhabitants of towns."

Trans. p. 714; 124 Cal. 637-638.

And the learned Chief Justice, after saying that the ancient pueblo embraced 4 square leagues, a little more than 17,000 acres, of land, and that by successive amendments to its charter it has been about doubled by the addition of lands outside of, and contiguous to, the original pueblo; that several parks have been laid out in the city, in which there are artificial lakes of considerable size, with lawns and shrubberies requiring irrigation; and that an outfall sewer had been constructed, through which the sewage of the whole city is carried to the Pacific Ocean, requiring a large amount of water (in fact 1500 inches. Tr. p. 118), and that the population of the city exceeds a hundred thousand, and is rapidly increasing. And, also, that the plaintiffs in error held their lands as successors to these several Spanish and Mexican grantees under patents and grants from the United States, he said:

"They claim that, even conceding the rights of the pueblo, and the city's succession to those rights (a concession which they make only for the purpose of the argument on this point), they are still entitled to the exercise of full riparian rights, except so far,

and so far only, as those rights are impaired by the paramount rights of the pueblo as they existed before the change of flag and without any legislative addition thereto.

"This claim, we think, is clearly just. The legislature of California could grant nothing to the City of Los Angeles which belonged to others, and the rights of the city, as successor to the pueblo, in the lands of riparian proprietors, holding under Mexican and Spanish grants, cannot exceed the rights of the pueblo itself.

"This being so, the facts detailed regarding the growth and extension of the city, and the municipal uses to which it is applying the water drawn from the river, give rise to the questions upon which the charge of the court and the instructions requested by the defendants so radically differ."

Trans. p. 715; 124 Cal. 638-639.

He then states that he understands the instruction numbered 4, given by the court, to have charged the jury that the defendants had no rights, as owners of these lands, to take any water from the river for irrigation, or even for domestic purposes (including watering stock), if, by so doing, they would deprive the inhabitants of the present or future City of Los Angeles of an ample supply for all domestic and municipal purposes, and then says: "I think this instruction is erroneous. If the paramount right of the city is only the right of the old pueblo, to which it succeeded, I cannot see how such right covers that large portion of the present city outside of the four leagues constituting the pueblo. The inhabitants of that limited territory, to whatever number they may increase, enjoy the full pueblo right, but beyond that territory the right does not extend."

Trans. p. 715; 124 Cal. 639.

He then says that

"The city, of course, has the power to provide water for all its inhabitants and for all public purposes throughout its extended limits, but if, in order to supply the territory outside of the pueblo boundaries, it finds itself compelled to encroach upon the riparian rights of land owners along the river, it ought to pay for those rights the same as for any other private property taken for a public use."

Trans. p. 716; 124 Cal. 639.

The learned Chief Justice has more difficulty with the public purposes to which the city might apply this water in the exercise

of its paramount right. Thinks that the instructions 13 and 14, which we asked and were refused, were erroneous, one in denying any paramount right at all; the other, in limiting too strictly the purposes for which the city, as successor to the pueblo, has a paramount right. This is instruction 13, and we here quote it:

"The uses to which the pueblo was authorized to apply the water was such purposes as pertained to the Spanish pueblo under the civilization of those times, and it did not extend to the cultivation and irrigation of parks, or the creation and maintenance of artificial lakes therein, or supplying waters for an outfall sewer."

He comes to the conclusion that the city's paramount rights did extend to supplying this outfall sewer, but thinks it did not extend to the maintenance of artificial lakes. Shows that it was not only the policy of the Spanish and Mexican authorities to foster the growth of pueblos, but also to encourage the raising of stock and other rural industries, to which the water for domestic purposes, watering stock and irrigation, were essential, and that it was not to be believed that in the primitive condition of society in those times, when the settlement of the country and support of its inhabitants was the primary consideration, the most favored pueblo would have been allowed to consume in the maintenance of ornamental fountains and artificial lakes, water necessary to the sustenance of an essential branch of industry.

Trans. p. 716; 124 Cal. 640-641.

Now it will be noticed that in the opinion delivered by Mr. Justice Temple, which was a concurring opinion in some respects and a dissenting opinion in others, he does not understand the instructions given by the learned judge of the trial court, any different from the Honorable Chief Justice, but differs from him only in the view that the city's paramount right was at all restricted by any limitations whatever, and that it has this paramount right to the use of all the waters of the Los Angeles river for any and all purposes, to which it chooses to apply them, and throughout any territorial limits that the legislature may choose to prescribe.

For the opinion of Mr. Justice Temple, see Trans. pp. 722-724, 124 Cal. 647-651.

Conceding again, for the purposes of the present argument, that the loose language employed in the various documents and laws which have been referred to by either courts or counsel upon the subject, can reasonably be interpreted to create any prior or paramount right of the pueblo at all, it is submitted that no such doctrine as was established in this case can be wrought out of any of them, even those which are the most favorable to such views, if there be any that can be called favorable at all. In truth, in spite of all the assertions of courts, that these statutes of the State of California, invariably introduced whenever the city's rights to the waters of the Los Angeles river are under consideration, cannot grant anything to the City of Los Angeles which the pueblo didn't have, and that a legislative act by which the property of one person is attempted to be taken away from him and given to another is unconstitutional and void, yet it is right in these acts that the sole authority for this claim of the pueblo is to be found. They were admitted in evidence over objections, and the court attempted to justify their admission by limiting them simply to the purpose of operating as an assignment of the rights of the pueblo to the City of Los Angeles.

Transcript, p. 828.

The language of the transcript is this:

"The court overruled the objection, and admitted them" (the statutes) "for the purpose of showing the succession of the present City of Los Angeles to the former pueblo under the Spanish and Mexican governments, to which ruling of the court admitting them for the purposes specified, the defendants excepted."

It must be obvious that the statutes can prove no such thing, for whatever rights were in fact vested in the pueblo by the Spanish or Mexican government, went to the city by virtue of the confirmation of the grant by the United States, and whatever rights had not become vested in it by the Spanish or Mexican government, passed to the United States government, and if it had any other rights than such as were conferred by the Mexican grant itself, it got it by that patent. The State of California did not suc-

ceed to it, and had no title of any kind in the property of the pueblo or of the City of Los Angeles, nor of the United States, and having none, it could grant, none nor could it assign any. And either the admission of these statutes must have passed merely upon the ground that they were evidence of what the pueblo rights already were, or they could have no effect whatever. Yet the courts of the state, while protesting that they are without force for the most objectionable purposes which we have suggested, have, nevertheless, always found in them something or other that in some way operates to transmit rights to the City of Los Angeles equally effective, and as pernicious as they would be if they were permitted in plain terms to take the property rights of the private individual, and turned them over to the city, for in these statutes alone is to be found any such rights in the Spanish pueblo or the American city. We call attention to the fact that the legislature of the State of California did not awake to the enormous extent of the ancient pueblo rights for nearly a quarter of a century after the state had been admitted into the Union. We have already shown that the act passed April 4, 1850, to incorporate the City of Los Angeles, (Stats. of 1850, p. 155) incorporated it only to the extent of 4 square miles, and that act declared that the corporation should succeed to the rights, claims and powers of the pueblo de los Angeles in regard to property, and should be subject to all the liabilities incurred and obligations created by the ayuntamiento of said pueblo. But it makes no attempt to define what those rights were.

The act of April 5, 1851 (Stats. of 1851, sec. 329), declared in its 3rd section, that "the corporation of the City of Los Angeles should retain all the powers and rights promised by the former ayuntamiento of said city, over the public lands belonging to said city and not included within its present limits; to lease, sell or otherwise dispose of said lands, as also to take from the river of Los Angeles the water needed *for irrigation of said lands*, by means of a dam or dams built without the incorporated limits aforesaid.

but the said corporation shall exercise no municipal authority over said lands except to regulate *the taking and distribution of water for irrigation as aforesaid.*"

Here again the sole right specifically recognized by the legislature is the right to take waters from the Los Angeles river for the irrigation of said lands, but the lands referred to had been distinctly declared to be the public lands belonging to said city.

The act approved May 1, 1852 (Stats. of 1852, pp. 186-187), provided, in its 3rd section, as follows:

"The common council shall have power, and it is hereby made their duty, to pass ordinances providing for the proper distribution of water for irrigating the said lands, to impose and collect taxes," etc.

And that is all that it did say in reference to their power over the waters of the Los Angeles river.

The act of April 13, 1854 (Stats. of 1854, p. 63), declares that

"The act of April 4, 1850, should be construed to vest and to have vested in the mayor and common council of said city, the same power and control over the distribution of water for the purpose of irrigation or otherwise, among the vineyards, planting grounds and lands within the limits claimed by the ancient pueblo and ayuntamiento de los Angeles, and by the said mayor and common council as the ejidos or commons of said city, the possession whereof is hereby declared to be in the said mayor and common council."

But this, note, is the power and control over the distribution of the water for the purpose of irrigation among the vineyards and planting grounds and lands within the limits of the ancient pueblo.

By the act approved April 11, 1859 (Stats. of 1859, pp. 199-201), the city was

"Authorized to borrow money for the purposes of municipal improvement, either for irrigation or furnishing water for domestic purposes."

And in the 13th section there was granted to the corporate authorities, to the extent which might be required by said city, the right of eminent domain for a distance of three miles, without the then confirmed limits of said city for the purpose of making a wa-

ter ditch or ditches, dam or dams, or reservoir or reservoirs, the right of entering into and appropriating and undermining for their own use, any lands which they or their officers might judge necessary for the suitable prosecution and success of their water improvements.

Statutes of 1859, p. 201.

The act of April 2, 1870 (Stats. of 1869-70, pp. 702-707), divides the city into irrigating districts, and prescribes a scheme for the distribution of water for irrigation purposes.

The act of February 20, 1872, (Stats. of 1872, p. 129), gives to the mayor and common council

"Complete control and power over all zanjas, water courses, water ditches and canals within said limits except the rights, privileges and franchises which had been granted to the Los Angeles City Water Company, and shall have power to take by purchase or otherwise land for the enlargement of the present zanjas, canals, water courses, and ditches, to increase the number and keep the same in repair."

But the whole act, so far as it deals with water at all, has relation to irrigation purposes.

And now we come to the act of March 26, 1874 (Stats. of 1873-4, p. 633), by the first section of which, for the first time, the legislature seems to have itself formed the idea of

"*granting* to the said corporation, to be by it held, used and enjoyed in absolute ownership, the full, free and exclusive right to all of the water flowing in the river of Los Angeles, at any point from its source or sources, to the intersection of said river with the southern boundary of said city; also the right to develop, economize, use and utilize all waters flowing beneath the surface in the bed of said river at any point or points between the points of termini above given, and for that purpose it is hereby declared that the powers to condemn property outside of the limits of said city."

might be exercised.

But this section did except all vested private rights to the waters flowing upon the surface or beneath it, in the bed of said river unless the same should be condemned.

Statutes of 1874, pp. 633-634.

And now let it be observed here, that the legislature manifestly did not understand that any such rights belonged to the City of Los Angeles by virtue of its being the successor of the pueblo, for it undertook here to grant this right to the City of Los Angeles, and it is the first act in the history of the state where any such grant was attempted to be made, and there never has yet been any recognition of such a pueblo right.

The same language is employed in section 1, article 2, of the act of April 1, 1876 (Stats. of 1875-6, pp. 693-694), and with the same reservation of private rights.

By the act of March 30, 1878 (Stats. of 1877-78, p. 643), in section 1, article 2, is substantially the same grant of rights, but without the exception protecting private rights. And this is the first time that the legislature conceived the idea that it had any such power. Up to this time there was either merely the recognition of the pueblo rights of irrigation and whatever other rights, if any, may have existed, and those acts which had purported to grant certain rights but excepting therefrom vested private rights; and this very exception was a plain, direct denial of the prior and paramount right now claimed by the City of Los Angeles; for, under the theory now existing and adopted and applied in this case, the City of Los Angeles did not have to condemn surface or subterranean waters of the Los Angeles river for any purpose whatever, but it owns it and can take it from the lands of other people, and without paying any compensation therefor. And this claim, we repeat, had its origin in this statute of 1878, and nowhere else, for it does not exist in the Spanish or Mexican law.

If we look to all there is in the plan of Pitic carried into this record, which undoubtedly contains that which is most favorable to the respondent, we find that the 6th section provides that within the 4 leagues assigned, all pastures, woods, water privileges, hunting and fishing, stone quarries, fruit trees and other privileges, shall be for the common use and benefits of the Spaniards and Indians, residing therein, and the 7th section, that the residents and

natives shall enjoy equally the woods, pastures, water privileges, etc., in common with the residents or natives of the adjoining or neighboring pueblos. And in the 10th section it is declared that the advantage of irrigation being the proper means of fertilizing the lands, and most conducive to the increase of settlement, the commissioners shall take particular care to distribute the water so that all the land that may be irrigable might partake of them, especially at the season of spring and summer . . . for which purpose it is directed that the territory be divided into districts marking out to each one a trench or ditch starting from the main source, by which the quantity of water can be regulated in accordance with the needs of each settler throughout the different seasons of the year, so that each shall know the ditch on which he is to depend, and be restricted to its use and to a certain quantity of water so that those below him may not be injured.

Section 20 provides for the appointment of an alcalde to each trench or ditch, who shall have the charge of the distribution of the waters, and who shall also cause such lands as the owners may neglect, to be irrigated at the expense of the owners.

Transcript, p. 91.

Turning back to the direction of Governor Neve for the establishment of the pueblo Los Angeles, and which is directed especially to this pueblo, he provides for the foundation of the pueblo in the immediate vicinity of the river, and that all the lands capable of irrigation should be carefully examined and that point selected for the erection of a dam, which would insure the distribution of the water to the greater portion of the lands; provides for a division of all arable lands into plots or lots.

Transcript, p. 9.

And no other use of water is mentioned save that of irrigation.

In 1st White's Land Laws of California, Oregon, etc., we frequently encounter regulations in regard to the waters and irrigable lands. In article 22, 1st White, pp. 436-637, there is the

provision already referred to for the sale of irrigable lands, at a price different from that to be paid for other lands. The same occurs in article 6, in the regulations for Austin's Colony (1 White, p. 589). Similar regulations in article 12, p. 604. Articles 22-24, p. 606.

Second White, 47, under title of Commons to be reserved (p. 50, No. 78, book 4, title 12, law 5), is the following:

"In distributing the lands, waters, watering places and pastures among the settlers, the viceroys or governors thereto authorized by ourselves, shall make such distribution by the advice of the cabildos (council) of the cities or villages, taking care that a preference be given to the regidores if they do not possess an equivalent quantity of lands and lots."

On pages 109 and 110 he speaks of the proposition for the privilege of acquiring and cultivating land, and says that the

"rate of taxes chargeable to each fanega of land to be cleared, and the annual proceeds of each, whether distributed among the inhabitants, leased, or adjudged to the highest bidder, whether the authorization so granted to clear the land shall be prejudicial to the herdsmen of the town, and to the persons enjoying the right of commons, for want of pasture, these persons being consulted thereon, as also the attorney and recorder general, and all other persons who shall be interested, and the traveling herdsman frequenting the commons, pastures and watering places."

And on page 126, article 8, it is provided that

"If any part of the tract belonging to each settlement be proper for irrigation, it shall be distributed among all, in proportion to the share to which each may be entitled, in order that they may lay it out into gardens, or in such other improvements as the nature of the land may admit or require; it shall be incumbent upon the settlers to open the channels for irrigation, and to contribute equally to their repairs, the expenses of which shall be distributed in proportion to the benefits derived therefrom."

This is taken from the regulations for the new settlements of Sierra Morena, id. p. 125.

And the 17th article provides for the settlements in each council, to establish mills and other mechanical fabrics, either to be worked by water or wind, and the same should be erected in the most convenient places without prejudice to third persons (id. p.

127). It would hardly be contended that this gave a prior or paramount use of the wind. Yet it would be as reasonable as a claim to such right to the water.

Under another set of regulations, the settlements, it is said, shall be as much encouraged in the lands susceptible of being irrigated as in the hilly tracts.

II White, p. 137, art. 11.

And many other like regulations will be found scattered through the book, those regulations differing in the different settlements or provinces. And from this frequent reference to irrigation and the watering of stock, and the many regulations which have direct reference to encouraging and promoting cultivation and stock raising, it is not strange that the earlier acts of the California legislature never had any reference to anything else than this power of distribution for the purpose of irrigating the pueblo lands. And if the paramount right existed at all, it was with reference to these uses, which alone seem to have been much regarded.

We are not contending that the pueblos and their inhabitants had no right to use water for any other purposes. It is not to be imagined that they were not free to use the water for all domestic purposes, but it is equally difficult to imagine that for any such purpose the right was paramount at all. It is not only difficult to imagine, but it is simply incredible.

The governments of Spain and Mexico did grant lands to other people, and they did encourage settlement upon them, and, indeed, in many instances, the rights granted depended for their continuance upon their occupation. But they could not be occupied unless they had the right to use the water for domestic purposes, and it would be simply absurd to say that under the Mexican or Spanish law no one would be permitted either to take a drink himself or to water his stock when the pueblo required the water for running outfall sewers and lakes in public parks. It was contrary to the entire spirit and genius of all Spanish and

Mexican laws for the colonization of the country, and there is no reason to believe that the pueblos had any better right, or prior rights, to the water for domestic uses than the grantees of the lands outside of the pueblos possessed, and that if this paramount right existed for any purpose, it was for the irrigation of the pueblo lands, and that was only paramount to the right of irrigation elsewhere.

In the opinion of Mr. Justice Temple, he says:

"I have never been able to see anything in the objections to the outfall sewer. It seems to me, if the city cannot maintain this, it cannot be a city at all *and retain the water rights of the pueblo.*"

124 Cal. 650, Trans. p. 724.

We confess that we do not understand that remark. It has never been claimed by us that the city could not construct and maintain an outfall sewer. We have contended only that its right to water for that purpose is not paramount to the rights of irrigation and domestic uses and other riparian uses on the lands of the plaintiffs in error here. If the city needs the water for an outfall sewer, what difficulty is there in its condemning it and paying for it? And if condemned and paid for, could not the city be a city just as well by the use of the water for that purpose which it had paid for, as by water which it held under some other title? But the sentence is that it cannot be a city at all and *retain the water rights of the pueblo.* But this is begging the question or assuming the point in controversy. If the pueblo has the paramount and prior right to all the waters of the river for any and every purpose to which it seems fit to apply them, why, then, that ends the question. If it has no such rights, as we are contending, the difficulty which seems to be suggested here does not exist. It cannot retain water rights which it never had, and if it never had them, it can acquire them by condemnation for that purpose as well as any other. The objection to the outfall sewer seems to us to be very palpable. The city, if it has no paramount right for that or other purposes to which we have objected, cannot ap-

ply the waters of the Los Angeles river to supplying those purposes, and then say that as to the waters of the river for every other purpose we have a paramount right. What we contend for is that when its paramount rights, whatever they may be, are satisfied, we are entitled, and cannot be postponed, to the use of waters for other purposes for which the city has no paramount right. And maintaining lakes and running outfall sewers from the city a distance of 16 or 18 miles to the sea, do not belong to the ancient pueblo prior rights, if it had any. And we say again, that this idea has no countenance in anything except the acts of the legislature of the State of California, and that they are in violation of the Constitution of the United States, and void, and that under the operation of them, the plaintiffs in error were deprived of their property without just compensation. It is no answer to say that the waters were granted or dedicated as much for the health or convenience of the inhabitants of Los Angeles as anything else, and because such an attempted improvement is deemed conducive to health, that therefore it is included within the favored purposes, because here we may apply the logic of the Honorable Chief Justice that if such a work becomes necessary, the city has the power to condemn, for that purpose, but cannot make the supposed necessity or convenience of the public, impose upon this use, the character of a paramount use. It is conceded that no such need was thought of by either the Spanish or the Mexican government. And everywhere that the rights of a pueblo in waters are mentioned at all, it is the waters within the limits of the pueblo, and that it never contemplated that a pueblo could have gone above its limits and above everybody else and taken all of the waters of a stream out of its banks and carried it through the pueblo and out into the sea in pipes that precluded its use for any other purpose by anybody.

VI.

THE WATERS MOVING UNDERNEATH THE SURFACE OF THE LAND AS DESCRIBED BY THE EVIDENCE, AND ALSO IN THE INSTRUCTIONS OF THE COURT BELOW AND IN THE OPINION OF THE SUPREME COURT OF CALIFORNIA, WERE PERCOLATING WATERS, AND BELONGED TO THE OWNERS OF THE SOIL EXACTLY AS THE ROCKS IMBEDDED IN IT, OR THE TREES GROWING UPON IT, AND THEY ACQUUIRED THIS PROPERTY UNDER THE CONFIRMED MEXICAN GRANT AND U. S. PATENT, AND THEY CAN NEITHER BE DEPRIVED OF IT WITHOUT JUST COMPENSATION BY AN ACT OF THE LEGISLATURE OF THE STATE OF CALIFORNIA, NOR BY THE DECISION OF THE COURT, AND THE DECISION IN THIS CASE WHICH DID, IN EFFECT, WITHDRAW FROM THE CONSIDERATION OF THE JURY ANY QUESTION OF THE VALUE OF THIS WATER DID DEPRIVE THE PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

We shall treat these propositions contained in this caption separately.

A

The water moving underneath the surface of the land condemned here, are percolating waters.

We know that this court will not interfere with the decision of the state court upon a question of fact, and if the proposition here presented is dependent upon the weight of evidence, it will not be considered by this tribunal. What we contend for is that under the evidence and under the instructions of the court, and the case assumed in those instructions, there is no question of the character of the waters, and they are percolating.

Conflicts may be found in the evidence upon many different propositions. The engineers may differ as to the amount of rainfall on the water shed, or the amount that will be contributed to the gravel beds of the San Fernando basin, or in the effect which the diversion of any given quantity of water from the underground sources will have upon the Los Angeles river as it flows on the surface, but we are not concerning ourselves with any such disputes. They are, for the present purpose, wholly immaterial, whatever significance they might have had before the jury in the estimation of values. Whatever water was moving under the surface of the earth through this tract of land, and the valley of which it was a part, was moving under certain conditions and presented certain phenomena to the vision, where it was visible, and susceptible of very accurate determination where not visible, and as to what were those conditions, phenomena, etc., there was no controversy between the witnesses of a substantial character. There may have been differences upon the questions of more or less, but none upon the substance of those facts. Therefore, in considering this question, we do not intend to make long extracts from the testimony, nor even to go into any extended argument upon it. The evidence taken upon this one question probably comprises five sixths of this transcript. To be sure, it has been somewhat extended by the manner in which the case was tried, and which, to secure to the plaintiffs in error the right to be heard in the Supreme Court upon a proper record, necessitated the duplicating of this evidence to some considerable extent. But the maps, profiles, oral evidence, all unite in presenting this court with a certain state of facts, and which, as we shall show further along, are carried into the instructions of the court, and though the statement in the instructions are not exactly correct in some particular, yet they do not differ far enough from the facts as disclosed by uncontradicted evidence, to make any difference so far as this question is concerned.

These agreed facts are substantially the following:

Extending from a little below the northern boundary of the City of Los Angeles, in a general northwesterly course, are two ranges of mountains, the one on the southwesterly side being the Cahuenga range, and the opposite, on the northeastern side, the Verdugo range. These mountains, rising to a height of perhaps 400 or 500 feet above the level of the sea near the city, extended northerly and increasing (though with some variation) in height until they terminate in the San Fernando or Sierra Madre range, which runs practically at right angles to these two spurs, and which rise to an altitude at the highest point, of something above 6000 feet. The distance from the City of Los Angeles to the base of the San Fernando mountains is about 30 miles. The San Fernando basin, so-called, is the upper portion of the valley between these two mountain ranges, and varies in width above the Pomeroy & Hooker tract from five or six to perhaps twenty miles in width, or more. Through the lands of the plaintiffs in error, this valley narrows down until the distance between the bases of these two ranges is about two and a half or three miles. (Tr. p. 118, fol. 154; also 408, fol. 629). And immediately after passing below the land sought to be condemned, the valley again widens to some extent, and then as it approaches the City of Los Angeles, narrows down to a space of about 4,000 (Tr. p. 231; also p. 261), feet, until it pass a little below the northern boundary of the city, when the river Los Angeles debouches into a plain of very considerable width, and the two ranges of mountains soon terminate.

The water shed around this San Fernando basin or valley is about 480 square miles (Tr. p. 226), and the waters which descend upon these mountains in the form of rain and snow, are precipitated into the valley down these mountain sides, which are very steep, and into this basin, which is composed of a loose, sandy soil and full of gravel and boulders as you penetrate beneath the

soil, and thus the San Fernando basin acts as a sort of sponge into which the rain water and melting snows are absorbed.

Those waters then move underneath the surface of the ground through this sandy, gravelly and rocky formation, for a distance of ten or twelve miles, and the Los Angeles river makes its first appearance at a distance of about 13 or 14 miles west of the Pomeroy & Hooker tract.

Says Mr. Friel:

"When I testified as to the point where the Los Angeles river rises, I mean the point where the water first appears on the surface, and flows. That is somewhere north or west of the Encina rancho. I could not locate the exact point at present, but about seven years ago I made a trip along the south boundary of the San Fernando valley, and west and nearly around the head of the stream, and from my knowledge, the river first shows upon the surface about 13 or 14 miles to the west of the tract of land sought to be condemned."

Trans. p. 345.

This river, from the time it first appears until it reaches the City of Los Angeles, increases in amount continually, and when it has reached the western boundary of the tract sought to be condemned, it has about 1073 inches of water flowing under a 4-inch pressure, and where it leaves the Pomeroy & Hooker tract on the eastern side, on its flow toward the City of Los Angeles, it has increased to 2062 inches, and it does not receive any sudden influx of water from any place that the witness (who is still Mr. Friel) had observed.

Transcript, p. 405.

The Pomeroy & Hooker tract is about seven miles from the city (Trans. p. 105). And the amount of water used in the City of Los Angeles, according to the testimony of Mr. Eaton, is 3750 inches (Trans. p. 118).

Other witnesses also gave the results of their measurements of the water entering the Pomeroy & Hooker tract on the one side, and leaving it on the other, but they all substantially agreed.

We have called attention to the results of the borings of innu-

merable wells, not only in this tract, but in various other places in the valley, and have shown that the material through which this water is making its way is everywhere substantially the same. The testimony in regard to these wells is as follows:

Testimony of Nudson, trans. pp. 190-192. Again, pp. 199-200.

Mr. Compton, city engineer, testifies concerning the wells and maps, pp. 223-226.

Burr Bassell, another witness for the city, gives us the results of his borings on pp. 258-260.

Mr. Downs, another witness of the city, pp. 262-267.

Mr. Bassell again, on pp. 499-509.

It matters little to which one of these witnesses one turns. They are all alike. Mr. Downs was boring wells inside of the city.

Take the testimony of Mr. Bassell, and it is seen that he finds sandy loam for 5 feet in city well A-1, and continues 5 to 10 feet, fine sand; 15 to 18 feet, moist clayey sand; strikes water at 17 feet; 18 to 21 feet, saturated fine sand; 21 to 26 feet, small gravel, and medium coarse sand; 27 to 32 feet,)coarse granitic sand; and so on, sand and gravel and occasional clay. (Trans. p. 499).

And by following his testimony, it will be seen that it is the same all the way through, fine sand, coarse sand, gravel, in some cases boulders, some coarse sand, and gravel, others fine sand and gravel, occasionally clay; water struck at about the same distance, and continuing down about as far as the wells were bored. (Trans. pp. 499-508). And he did not find the bedrock in any of those wells with the exception of the one that he spoke of at the end of the tunnel line.

And so Mr. Newman testifies that the water in the San Fernando valley comes from the same water shed, and comes to its position or place in the same manner that the other water does, and runs through about the same material. "They show, in some places a little coarser material. The material seems to keep changing, lays in strata, and you can say, in a general way, through this

tract the material is all about the same. Still, we have seen by our borings and the level of the water, especially in the bigger wells, that the grade line of the water coming down the San Fernando valley is a broken grade line, and that is only on account of the different resistance that it meets. . . . . The water-bearing soil is composed, in some instances, of sand and gravel, and another of boulders and gravel; the water flows more freely in some of these strata than in others, and I think flows more freely in the coarser material." (Trans. pp. 209-210).

Fred Eaton, a civil engineer, testifying on behalf of the city (trans. p. 226), says:

"The material discovered in the various wells and cuts are not practically the same all through. In the Pirtle development cut there was lots of coarse gravel. Some of these wells show gravel quite free from sand; I believe every one shows gravel; they all show sand, and pretty nearly all of them a little clay. The material brought to light by those excavations and wells is practically the same throughout the whole extent of country, differing a little in the proportion of gravel and coarse sand and fine sand and clay in different parts, but practically the same. Water is found in all those wells 15 or 20 feet depth below the surface. They vary, and it is found at a depth varying from 150 to 123 feet; some wells are only 30 or 40 feet below the surface, but it is very likely that the deposit of a similar character, if not the same, occurs further down."

Trans. p. 235.

Burr Bassell, in testifying for the city, gives a description of the material found (trans. p. 258-259), and on the latter page it is stated ,in the bill of exceptions, that the witness then proceeded to testify as to the material of a large number of wells, but they were all substantially the same. The water plane met with at practically the same distance below the surface, the difference being accounted for by the difference in the surface topography, the water being found in about the same material.

Trans. p. 259.

It will thus be seen that so far as the material that constitutes this entire basin, there is no substantial difference in the testimony

of the witnesses, and no great deal of difference in the material in different parts. It is all washed from the mountain sides, and has filled in to a depth of from 100 to 200 or 300 feet.

We next call attention to what is testified concerning the manner in which this water is moving underneath the surface and upon the surface.

Friel testifying, says that the velocity of the Los Angeles river taken by him on the 21st of September, 1893, was about two feet per second, and was then at about the average flow of the water in the river, not affected by the floods. The next velocity he took on February 17th of this year, (that is the year that he was testifying) he took at about the same place, and it was 2½ feet per second. At that time there was some flood waters in the Los Angeles river.

Trans. p. 406.

On March 17th he was testifying again, and had taken the velocity since the measurement of the grade at Saturday noon, at points other than those which he had given. Took the velocity at four points in this tract in question. States where the points were, and at one the velocity was 2½ feet per second; the second, 2.2 feet per second; the third, 3.3 feet per second; the fourth had 2.6 feet per second.

Tr. p. 406.

No evidence is given in contradiction of this at all.

We now present the evidence as to the velocity of these underground waters.

Newman says:

"The experiment that I made demonstrated the velocity of the water after we made the cut (he is here speaking of one of the cuts on the Pomeroy & Hooker land, he being a witness for the defendants, and having made an examination of the cut). It does not show how the water was moving before we made the cut. This is not the velocity of the water in the cut, but the velocity moving in the ground after the cut was made, and near the cut. We have made some experiments, and have two in these cuts, to get at the velocity. Now, that velocity is pretty large."

And as he had told North before they made the cuts, it wasn't alone the percolation that had supplied the rate.

Transcript, p. 201. And see also 202.

Up to that point they had not made the calculation as to that velocity. On page 209 he says:

"The water of the Pomeroy & Hooker tract, in my opinion, above the plane of those cuts, moves between 14 and 17 miles per year. That estimate is made on the ground that it lies above the elevation where this lower cut enters the river. That is the only land we have been able to examine, as all the land lies above the elevation where the lower cut enters the river."

He repeats twice more on that page, that the velocity of the underground water in that tract was from 14 to 17 miles a year.

Fred Eaton puts the velocity down about the cross-section near the city at less than half a foot an hour.

Trans. p. 231.

Friel testifies that he had assisted in making examinations to estimate the velocity of the subterranean waters through that section of the country, and that in the upper cut, the amount of water that was shown by a cross section of the cut showed a velocity of about 17 miles per year; at the lower, 14 miles per year. But the conduit from which that computation was made, was derived from the amount of the water right at the cut, and the tendency of the cut itself upon the water moving upon the slope or the drainage of the water of the cut would accelerate the motion of the water.

Trans. pp. 406-407.

We next invite attention to the manner in which this water was known to be moving, and the amount or proportionate amount of water as compared with the mass of material. Mr. Newman had observed these cuts on the Pomeroy & Hooker tract, the lower one being 1500 feet long, and the upper 600 feet. There were a good many wells sunk and a good many over a hundred. They were put down before the cuts were made.

Trans. pp. 200-201.

They made several experiments to ascertain how much water that kind of ground contained, and found that a third of the material was water.

Trans. p. 201.

He gives the description of the motion of the water down this San Fernando valley until it strikes the hill on the south, and then flows easterly along the north base of those hills (the Cahuenga), and the course of the waters through the lands in controversy, he should think, is mostly easterly, and he is speaking of the subterranean water.

Trans. pp. 200-201.

And after making calculations of the amount of water flowing through there, he says that the subterranean water in this tract of land, compared with the level of the stream of the Los Angeles river, is about three feet high, and it is shown several times that after the cuts were made the water between the cuts and river stood higher than the surface of the water in either.. And he said if, "in boring the well, the machine had entered into an open defined channel of water, the water would certainly have gone off into the stream." But as a matter of fact, in the pipe which he there referred to in the well, the water raised 5 or 6 inches (Tr. p. 204, fol. 292). In the cuts you can go along and see the water percolating in both from the sides, the ends and the bottom, and was not confined to any one place, but was general through the whole length of the cuts. He measured the water in the cuts, in the lower in two places, in the upper three. The lower was 1500 feet in length; near the head of that cut there were 25.53 inches, that was 200 feet below the head. Right at the head they "didn't measure because there where it first began, it begins with a pretty fine percolation, and in a short distance increases pretty fast, and 200 feet below they find this 25.52 inches, and at the lower end there was 121 inches. And the increase between these two points of measurement was a gradual increase all along the cut, there was no difference discernible at different points at all. There was no place

where you could see the water coming in any faster than at any other place. It was a percolation visible all along the whole of the cut."

Questioned by the court: "Q. It came in, though in little streams that you can see, didn't it?

"A. Yes, certainly it gathered, and before it struck the surface of the running water it would go in little streams.

"Q. Those little streams that you saw are simply the accumulations of the waters pouring in from the sides?

"A. Well, certainly.

"Q. Are there not some places along there in building that ditch where you can see that the water comes in more freely than it does at others?

"A. In some places there where, in building the ditch, was a little scraping out, and these depressions where they went out with the scrapers it is little flatter than the general bank of the trench."

The court said: "I am not referring to those places."

Witness: "And in these places you can see the streams get a little bigger and look bigger but otherwise it is a pretty uniform increase all along the ditch. There is some little difference in the formation of the bottom of the ditch as to the size of the gravel and boulders, and things. It may come out more freely where the gravel and boulders are larger than at other places where it is finer, but still honestly when we went along there to examine it, to me it appeared if there was any extra great flow in some places there I would have measured it."

The Court: "I don't mean any very great difference, but some difference so that you could notice it."

"A. Yes, you can see that may be it was percolating a little faster in one place than another, but still it is pretty uniform all along the ditch or trench. The first time I measured in the upper cut, I measured in two places, one at the mouth and the other half way up; there was 76.5 inches at the mouth, and 32.7 in the middle. At a later date I went up there to measure to ascertain the rate of velocity, then we measured near the head of the cut, and made it 17.97 inches; that was 170 feet from the head of the cut."

He had been all along that cut, and the rate of increase of water flowing in the cut is very gradual. The measurement in the middle is approximately half what they got at the lower end.

Trans. pp. 203-207.

On this latter page is one of the places where he says the water in the lower cut is not, in his opinion, affected by any flood or percolation from the river, and the reason he thinks so is because the water of the saturated plane stands fully three feet higher than either the water in the river or in the cut, and between the cut and the river. But every cross section at every place where these rows of wells shown on Exhibit F shows in every one of them that the water stands higher in the grounds than between the river and the cut. We do not think the water that is percolating into the upper cut is affected by any percolation from the river or the Tejunga.

Tr. p. 207, and also pp. 204, 207, 231.

On page 208, in answer to the question from the court, he tells what he means by a well-defined stream; that it is a stream that has banks and bed, and flows like flowing water does, and that he did not recognize any stream of water flowing through coarse gravel or any flowage of water through coarse gravel, as a stream at all. That that is percolating water. And that he didn't consider that there was a water course in anything that was only 1-3 water.

Trans. p. 208.

He says again: That in examining the cuts he couldn't tell whether the greater quantity came from the sides or from the bottom. It came in from the bottom, all over. "You could go along and see little white pebbles jumping in the bottom of the cut showing that there are streams coming in from the bottom as well as the sides, and these places are quite numerous. Seems to percolate in pretty gradually all along. On the sides you can see the water coming right out and see it flow, little rivulets, coming into the main stream."

Trans. pp. 211-212.

Mr. Finkle testified as to the velocity of the subterranean water substantially as the witness Newman, and also that of the material in the said tract sought to be condemned, about 1-3 was water, and Taylor, Sanders and Friel all testified concerning the amount of the rainfall and the area of the water shed, the amount of the sub-

terranean waters that could be developed on the tract of land, without diminishing the flow of the Los Angeles river, the character of the water, tending to show that the same was percolating, and substantially in the same manner as the witness Newman and the witness Finkle, except that Sanders testified that, in his opinion, there could be from 2000 to 3000 inches developed upon the land in controversy without affecting the flow of the river.

Trans. pp. 217-218. And see Friel's testimony, pp. 232, 234, 235.

Mr. Eaton gives a description of how the water comes into the Los Angeles river, and says that it is in the same way. The water boiled up from the bottom, and ran in little streams in the sides, some places very distinct, at others you don't perceive it at all. And he saw the same appearances substantially in the cuts on the Pomeroy & Hooker land that he did in the river bed, both at the sides and bottom, the cut being an artificial depression in the saturated plane as the river is a natural one, and supplied in the same way.

Trans. p. 241. And see particularly p. 242,

where, although he has used the word "streams" it is shown to mean the gathering together of many of these little streams of water as they reach the surface of the sides and would slough off and tumble down just as the perspiration will gather on the surface of the skin and flow down. He spoke of little minor channels coming in on the sides. And being asked how many of them there were in that 1600 foot cut, said he didn't count them, that there were a whole lot of them. Questioned as to whether he thought there were less than a million, he does not answer directly, but said that he was not guessing on that, and that he never tried to make any estimate of the number of them.

Trans. pp. 243-244.

Such is the testimony of all the witnesses as to the manner in which the water is moving underneath the surface, and the velocity at which it moves.

While we do not recall any testimony that makes the matter any stronger in favor of an underground stream, we call attention nevertheless to the testimony of another one of the expert witness on behalf of the city.

Mr. Gervaise Purcell, whose testimony commences on page 268, testifies as to the amount of rainfall; makes his estimates concerning the amount of water furnished to the sponge or gravel bed; his direct examination continues to page 272. After stating that the ordinary summer flow of the Los Angeles river is a constant quantity, and that that indicated that the capacity and absorption of the gravel beds that govern the flow were limited by the minimum rainfall, and that all that falls over and above that must find its way out and be dissipated by some other means, said:

"Q. You take it that the year that the flow of the Los Angeles river in its ordinary summer flow, in the year of the smallest flow, is the index to the capacity of the underground reservoirs by which it is supplied?

"A. Yes sir.

"Q. In other words, percolating waters?

"A. Yes, in other words, it is a governing factor, and not only the governing factor, but it determines the fact that the river cannot be any more; that if there were any lesser rainfall or none at all for a series of years, you might possibly have no river, but you can't have any more, and that leads to the conclusion that all that flows over that minimum average flow of the Los Angeles river must be done away with through some other way than through the Los Angeles river, that it must either go in floods or in agricultural uses."

And in answer to a question put by the court, said that that theory does assume that the minimum rainfall is sufficient to keep those gravel beds full enough to supply the stream, and if it fall below that, the stream would decrease, provided the stream took all that the minimum gave, but he had no proof that it did.

Trans. pp. 274-275.

He had been at the excavations on the tract of land sought to be condemned, but he didn't measure the quantity of water because he didn't want that information for the purpose he was making of the other measurements, and didn't form any opinion about it.

And now being asked as to his meaning when he is using the term "underground streams" at one place, and "underground channels" at another, he answers:

"Well, I call the water that runs in an underground channel a stream, and I would call the channel the means by which that stream got out, the conduit so to speak.

"Q. Can you give us a more definite description of what was in your mind when you were speaking of cutting off those underground streams by the excavations to the north of the river on the Pomeroy & Hooker tract?

"A. All I mean to convey was this: I don't consider that that water comes down in one continuous sheet. I consider that it comes down in a series of streams, some more and some less, and that while there——

"Q. You don't think that the water permeates the soil all through and percolates its way through the interstices of the material through which it flows?

"A. That word 'percolates' has been so discussed that I would really like to know what you mean before I could understand the question.

"Q. Well, the best authority in the world upon the meaning of the word is Webster's dictionary, I believe; have you taken the trouble to look at it?

"A. Yes, I took the trouble to look at it, and it refers you to "filtration," and back from "filtration" to "percolation", so I was rather at sea about it. It is not Webster's dictionary use of the word, but I want to know what you mean by it when you ask the question.

"Q. My meaning of it would be, perhaps, objectionable to the counsel on the other side. My understanding of an underground stream is nearly the same as a stream on top of the ground, that is, a water course.

"A. Well, my understanding of an underground stream does not differ very much from yours, with the exception that the channel of it has material in it which has been brought into it by previous floods, gravel or something of the kind.

"Q. Your idea of this water is that it is diffused all the way through the soil. You don't know of any place that being sunk that they didn't find water?

"A. They might have sunk a good many places and didn't find water that I didn't know anything of. I testified in the Crystal Springs Land & Water case that from the examination of the map and the premises showing those 24-inch pipes located as shown on the map and under the river, in my opinion the water comes mostly

from the river, and I will give my reasons. The amount of water that comes along within 1200 feet of the end of these pipes is about 9 feet per second. From that down, which is the longest portion, it only increases a foot and a half, which would tend to indicate that the larger amount of water comes from this upper portion that runs down the river. I so testified, and that is my opinion still. On the same occasion I testified that I had occasion, in these researches, to examine into the question of percolating waters, and underground flow. That I had made a personal examination of the bed of the Los Angeles river in the neighborhood of the Crystal Springs. That I was there on four different occasions. I had heard the testimony of Mr. Basseli, in regard to the location of the wells and of the pipes and flumes, and of the opening in the bulkhead, and the opening in the flume where it crosses the Crystal Springs; and after this preliminary examination, I testified that the character of the formation of the soil around the Springs seemed to be what you might call river bottom, and what was made by the river. Sands. And this question was put to me: 'Q. Well, how is that soil; capable of absorbing water by percolation? A. Oh, yes sir; that soil would absorb 20 per cent of its bulk, probably 30 per cent under certain circumstances, of water.' I so testified. That is, about 30 per cent were voids that would be filled up by absorption."

Trans. pp. 274-276.

On page 277 he refers to the area of the river bed in this tract of land sought to be condemned, and it is about eleven acres.

Trans. p. 277.

They made no attempt to ascertain the velocity of the water.

This is one of the witnesses who, while testifying that to take the underground water from this tract would affect the flow of the river, does nevertheless show us very claerly that the reason is that he is considering the whole volume of water, not only the surface flow, but all underground, as a part of the river. He says, in answer to a question, that he didn't consider the surface and underflow as different. That he considered in this question they are intimately connected.

"Q. They are one and the same thing?

"A. Yes.

"Q. Now let me ask you before you go any further, had you been giving your whole testimony upon that assumption?

"A. That they are one?
"Q. Yes sir.
"A. On this particular river, I say that the underflow and overflow are intimately connected so far as I can see."

Transcript, p. 279.

Mr. Pirtle, a witness for the plaintiff's in error, and whose testimony begins on page 435 of the transcript, and extends to 440, gives a description of the manner in which the water comes into the cut known as the "Pirtle" cut, and frequently referred to in this evidence, and it is some little distance from the land in controversy. This, too, is the cut where the water comes in more freely than any other place that was examined by any of these witnesses. And at one place he says:

"We paralleled this main cut with the lateral as an experiment to see whether one would draw from the other. We noticed that the water seemed to come out from the bottom of the flume. As we would go along we would strike little streams the size of your finger running from the side, and in a few days that would disappear and we would see it bubble up from the bottom, so we concluded to put in this cross cut, as we call it, side flume, as an experiment to see whether that would draw water from the bank between the two flumes, and entirely cut it off, but we found that it did not. The water comes up from that in the bottom and runs in the side, from both ways, which proved to us clearly that the pressure was from underneath."

Trans. p. 439.

We have, then, this condition of things, the waters coming confessedly underneath the surface permeating this material, and composing from one-fifth to one-third of the entire mass, making its way through interstices of the said material of sand, gravel and boulders which make up this entire river bottom until, as it approaches the western extremity of this 314-acre tract, the valley is narrowed to a width of 2½ to three miles, throughout which entire stretch from one side to the other, wherever a well was sunk (and there were hundreds of them) the water is found, and found presenting substantially the same conditions. Before it reaches this narrow part of the valley, the Los Angeles river ap-

pears on the surface, and increases as it advances and passes through the tract of land sought to be condemned, in a surface stream of an average width of 45 feet. Tr. p. 387, fol. 594. This body of water known to men generally as the Los Angeles river, is flowing at an average velocity of about 2½ feet per second. These underground waters moving in the same general direction between these two mountains, and extending from base to base, is flowing at an estimated velocity of from 14 to 17 miles a year, and we will assume the latter, though we know it is in excess of the actual flow. And it extends to a depth of about, we will say, on an average, 100 feet. It is known to extend below that in some places, and perhaps in others, not so deep. And this mass of water is moving through this material in the way described and at the estimated velocity above mentioned. And it is this mass of water to which the instructions to which we shall call attention further along are directed.

And now, it is submitted, that if we take every factor that enters into the description of percolating water in the most exaggerated form that it can be found expressed anywhere in the evidence in support of the theory of an underground stream, and still these waters are percolating waters by any definition that was ever given, either of percolating waters or its opposite or alternative of an underground water course. The authorities upon this subject are so inseparably interwoven with the other question of the title to such waters, that we shall refer to them when we come to consider the ownership. We pause here to state that this tract of land sought to be condemned, which is about two miles in length from east to west, and of an average width of a quarter of a mile (trans. p. 104, fols. 131-132) is selected by the city for the purpose of constructing headworks which are to consist of a main tunnel about 8700 feet in length (trans. p. 328, fol. 497), and varying from nothing to 32 feet in depth below the water level (trans. p. 209, 214), and extending nearly the entire length

of the tract (trans. p. 117), and four laterals, sometimes called filtration galleries. Lateral No. 1, which commences about 100 feet east of No. 193 on the line of the main tunnel, and runs in a northwesterly direction until it strikes the northern boundary of the tract sought to be condemned. The second commences at a point between Stations 40 and 50 on the main tunnel, about 150 feet west of station 40, and runs in a northwesterly direction till it strikes the northern boundary of the tract, and is 1425 feet in length. Lateral No. 3 is also described, and is 920 feet in length; and lateral No. 4 is about 1100 feet in length.

Trans. pp. 194-195.

And with these, a submerged dam is also stated to be a part of the plan although very plainly shown to be an impossible part. And it is agreed on both sides that the plan proposed by the city is a fairly good one for the purpose intended, viz., to obtain these subterranean waters, the witnesses for the plaintiff in error differing from those of the defendant only in some comparatively unimportant portions. And it is largely with reference to this plant and its capacity for the development of the waters that the testimony in the case is introduced. The testimony of the witnesses for the plaintiffs in error being to the effect that from 2000 to 3000 inches of water can be developed by that plan, or substantially the same, without affecting the surface flow of the river.

And this could more easily be done by a plan which kept away from the bed of the river.

B. These subterranean waters belong to the plaintiffs in error, as the owners of the soil, absolutely.

This doctrine almost as frequently as it is stated, is set forth substantially in this form:

"Water filtrating or percolating in the soil belongs to the owner of the freehold, like the rocks and mineral found therein, *and he may use them as he chooses*, free from any usufructuary rights of others."

"Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth." This is the doctrine

of the English common law. The leading case upon this subject is that of Chasemore vs. Richards, 7 H. L. C. 349; same case, 1st Eng. Rul. Cases, 729.

The declaration in that case stated that the plaintiff was possessed of an ancient mill, etc., and entitled to the flow of the river Wandle for the purpose of working and using the mill, and that the defendants, the board of health, wrongfully abstracted and prevented the flow of, and diverted the water of the stream away from the mill, and abstracted and prevented and intercepted the flow, and diverted the water which ought to have flowed into the said stream and mill digging and sinking a well near to the said stream, and taking the water of the stream.

A verdict was entered for the plaintiff at Kingston Assizes, and a case stated for the opinion of the court. And it appeared, among other things, that the plaintiff had, for 60 years before the acts of the local board, used and enjoyed, as of right, and were entitled to use and enjoy the flow of the river for the purpose of using the mill. That the river Wandle commenced its course near a part of the town of Croydon which is nearest to the said mill. That the river is fed and supplied above the plaintiff's mill (among other sources) by the rainfall on a district of many thousand acres. That large quantities of this rainfall sink into the ground, and flow and percolate through strata towards the river Wandle, and do reach it in quantities material and appreciable above the mill of the plaintiff. That the effect of the taking of large amounts of this percolating water would be to materially affect the quantity flowing into the river above the mill, and that these acts which were complained of had that effect, but not by abstracting water which had already become a part of the stream, but by intercepting this underflow.

See the statement of the facts, 1st Eng. Rul. Cas. 729-733.

The arguments of counsel are given, and Mr. Justice Wightman delivered the opinion of the judges who had been present at the argument, and which he said was the unanimous opinion of

those judges. It was held that the plaintiff had no right of action, and this question is discussed fully, and the previous decisions commented upon. We make a few extracts which bear particularly upon this case.

They quoted from Mr. Baron Alderson remarks in Broadbent vs. Ramsbotham to this effect:

"All the water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must by force of gravity find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which it falls from dealing with it as he pleases, and appropriating it. He cannot do so if the *water has arrived at and is flowing in some definite channel.* There is here no watercourse at all."

1st Eng. Rul. Cas. 742.

After referring to Dickinson vs. The Grand Junction Canal Company, which was apparently against them, and stating what was there decided, Mr. Justice Wightman says:

"In the same judgment, however, the court refers to the case of Acton vs. Blundell, 7 Exch. Rep. 300, apparently with approbation, and observes "that the existence and state of underground water is generally unknown before a well is made; and after it is made there is difficulty in knowing certainly how much, if any, of the water of the well, when the ground is in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to his neighbor. These practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters."

Here ends the quotation, and he continues:

"But the court, without at all adverting to this distinction which it had adopted, treated the case of underground percolating water as governed by the same rules as would obtain in the case of visible streams and water courses above ground; and no remark or comment is made or reason assigned by the court for arriving at a conclusion, which not only does not seem warranted by the premises previously adopted, but is in effect hardly consistent with them."

And he says that these considerations, and others stated by him, greatly weaken the effect of the case of Dickinson vs. Grand Junction Canal Co. as an authority against the defendant upon the point now in question, but it is authority in his favor to show that

right to water is not by a presumed grant from long acquiescence, but, if it exists at all, is *jure naturae*, and that the rules of law that regulate the rights of parties to the use of water are hardly, or rather not at all, applicable to the case of waters percolating underground.

The opinions of the different judges who expressed opinions extend from I Eng. Rul. Cas. 741 to page 758.

It is followed with English notes, in which innumerable cases are cited, and these also by American notes, the notes extending from page 758 to page 764.

The citation of further authorities would seem unnecessary, for there the doctrine is stated with all its limitations and exceptions, and innumerable authorities cited in support of them, and the principle which we have stated is recognized everywhere.

It will be noted both in the principal case and the notes, that a distinction is made between excavations or wells sunk near the stream, by which water has already become a part of the water course, is abstracted therefrom, and the mere interception of percolating waters which would have found their way into the stream. But no question of that kind is raised here, either by the evidence or the pleadings. The complaint declares that the Los Angeles river flows through the City of Los Angeles, and is *fed* by springs which rise to the surface in or adjoining the bed of the river.

Trans. p. 63, par. 1.

We have several times called attention to the evidence, by which it is shown that the waterplane of the subterranean waters stands above that of either the river or the cuts, and the testimony of all the witnesses is that both, that is the river and the cuts, are fed in the same way by the waters coming into them from the sides, and welling up from the bottom. Mr. Schuyler, one of the chief experts of the plaintiff, said that if a system of tunnels were constructed on this land of a capacity to obtain 3000 inches of water, in his opinion it would drain the river so that there would be no water upon the surface practically; that "if this tunnel were placed

between the river and the source of supply on the north, and across the drainage of the Tejunga, which would be the position as indicated on the map, it would have that effect of intercepting the *water which now comes to the river and carrying them off!*"

Trans. pp. 586-587.

Again: "When I say that a tunnel under there that would develop 3000 inches of water would drain the river, or practically, in my judgment, I do not mean simply that that would be the effect because I think there's only a limited quantity of water there; I think that would be the effect because *it would intercept the underflow of the stream, to the depth to which the saturation plane was cut.* I think it would have a direct influence on the Los Angeles river, because the surface flow of the river is less than 3000 inches. This tunnel intercepting the direct course of the channels *supplying the Los Angeles river, would first affect that portion of the water which now reaches the Los Angeles river, and prevent it from reaching the river.*"

id. p. 587.

He continues by saying that he knows the water is coming up in the bottom as well as through the sides, and that the water stands higher between the cut and the river than it does in either the cut or the river.

id. p. 587. See also pp. 587-590.

And we submit that this being the case, it is absolutely immaterial what effect those excavations would have upon the surface flow of the river by the process of intercepting that which now feeds the river. The decisions show also the owner of the soil owns the percolating water just as he does the earth and the rocks imbedded in it, and he may do as he pleases with it, notwithstanding the effect may be to dry up his neighbor's well or spring or a natural watercourse. And, furthermore, we might here add that the cases referred to never could have arisen unless something of that kind had occurred. No one would pretend that the owner of the soil cannot sink wells or make tunnels or any other thing for the purpose of accumulating those percolating waters, or carrying them off of his land, provided no loss of any kind accrued to anybody. In such a case the question would be a mere abstraction.

It is only when some one does suffer a loss, or at least believes he does, that the case arises.

The doctrine of the common law has been declared as explicitly in this state as it ever has been anywhere else.

In Hanson vs. McCue, 42 Cal. 303, the court said that

"Water filtering or percolating in the soil belongs to the owner of the freehold—like the rocks and minerals found there. It exists there free from the usufructuary rights of others."

"The owner may appropriate the percolations and filtrations as he may choose, and turn them to profit if he can. To hold otherwise would be to hold that the plaintiff here could lawfully claim a right to convert the lot of McCue to a mere filter for his own convenience."

42 Cal. 309.

In that case it was also said that the court below mentioned in its findings "the hidden and subterranean veins, streams, and sources of said spring" as about to be cut off by the excavations, and that counsel for plaintiff argued that this amounted to finding that there was a subterranean stream of a defined character, and flowing in a defined channel, which was about to be diverted. "But," said the court,

"it is evident that the finding means, in substance, that the spring is supplied in some way by hidden veins or subterranean streams; but the court does not find that there is any stream known to exist at all, or if there is, whether it flows in a defined channel, which is the important point to be found. It amounts only to a finding that the 'sources' of the spring—be they what they may—are cut off. I do not understand the finding as establishing the exceptional fact that the spring here is fed by a known running stream of water flowing in a defined channel."

42 Cal. 308-309.

This doctrine is approved in Cross vs. Kitts, 69 Cal. 217.

In Hale vs. McLea, 53 Cal. 578. And in

Painter vs. Pasadena L. & W. Co., 91 Cal. 82.

From which case we quote this passage:

"There is a wide and apparent distinction between the water of a running stream and water which rests in the soil. The former assumes a distinct character from that of the earth; no exclusive

property can be acquired in it while it is still flowing in its natural condition, . . . the latter (that is, percolating water) is confined in the earth, and 'has no distinctive character of ownership from the earth itself, any more than the metallic oxides of which the earth is composed'."

91 Cal. 82.

And here the court cites, among other cases, Hanson vs. McCue, and quotes from it that which we have already quoted, and approvingly. And it added:

"Being an integral part of the realty, the right to take it away for use or profit is as much a *profit a prendre* as the right of fowling, fishing, hawking, or the common of turbary, or the common of estovers."

id. pp. 82-83.

And they quoted approvingly from Trustees of Delhi vs. Youmans, 50 Varb. 319, this passage:

"The water belongs to the soil, is part of it, and may be used, removed, and controlled to the same extent by the owner."

id. p. 83.

The same doctrine is announced in Southern Pacific Co. v. Doufour, 95 Cal. 615, 617. On the latter page Trustees of Delhi vs. Youmans, 50 Barb., is again quoted, and the same passage extracted, and the court says:

"The facts of this case place it entirely without any recognized exceptions to the foregoing rule, and bring it directly in line in all essential particulars with Hanson vs. McCue, 42 Cal. 303, where the principles declared in the case of Trustees of Delhi vs. Youmans are fully adopted; and this court went to the extent of saying that, in the absence of any proof that the spring was supplied by any well-defined flowing stream, it would be presumed to be formed by the ordinary percolation of water in the soil."

95 Cal. 617-618.

And finally, upon this subject, that same doctrine is announced in this case in an instruction given by the court to the jury, from which we make this extract:

"In addition to these rights and benefits arising from the flow of the river through this land, the defendants are the absolute owners of all such water as may be present in the soil of this land,

and which does not constitute a part of the water of the river. This is usually called percolating water."

See instruction 12, p. 645 of the transcript.

This being the legal right of the owner of the soil declared by the common law, and established in California by these decisions, then we repeat that the patent of the United States government which vested the title to this land in the predecessors of the plaintiffs in error, carried with it, as an incident to the title which was thus conveyed, the absolute ownership of the waters percolating in the soil. They owned it as much as they did the oxides of which the earth is composed; they could gather it together and appropriate it and remove it and do whatsoever they saw fit with it, and without the slightest regard to how it might affect the flow of the Los Angeles river, though it did intercept the sources of supply, and the waters which might thus have been taken away by these excavations and carried to some distant point might thereby have been prevented from entering into and supplying in part, the waters of the Los Angeles river, which they might or would have done but for such diversions.

C. The plaintiffs in error cannot be deprived of this property right without just compensation, by any act of the legislature of the State of California, nor by the decisions of the court.

It is needless to cite any further authorities in support of this proposition than those already cited.

D. The decision of this case did deprive the plaintiffs in error of their property without any compensation.

Now, if we are correct upon the main question which we have above stated, and if it be true, as is established by this court, that the provision of the 14th Amendment of the Constitution is directed against the acts of judicial tribunals as well as any other department of the government of the state, then the only remaining question is, can the courts accord to the plaintiffs in error this property right with one hand, while taking it away with the other? Can they, in one breath, say the percolating waters in the soil be-

long to you, and in the next, by the process of judicial definition, declare that there is no such thing as percolating water? Or can they, by stating a case which clearly makes it appear that the water is percolating, then tell the jury that if they find the existence of those very facts, they shall not consider them or give any compensation for them because they constitute an underground watercourse?

As we are not unaware of the difficulty that we shall have here upon this point, we wish to make our position perfectly clear. We do not deny that if the evidence in this case was such as that the question as to the character of the waters arose, if there is any question upon that evidence as to whether the waters are percolating, or constitute an underground stream, and that question was submitted to the jury, and either actually or presumptively decided against the plaintiffs in error, we know that ends the question, so far as this court is concerned. But if that be not true—if a new dictionary has been created, and a well known term given a definition directly opposite to anything ever known before, and the plaintiffs in error thereby denied that compensation to which they were entitled, we submit that it is as much a violation of the 14th Amendment to the Constitution as if it had been done directly. Percolating water is not a name, but a thing, and when the thing itself is described, the owner cannot be deprived of it because a jury is told that the name "percolating water" is not applicable to that thing. The Government of the United States, with respect to navigable streams, has extensive powers for the preservation of the rights of the public growing out of its power of regulating commerce between the states and with foreign nations, and the Indians. And if a suit were brought to abate a nuisance that impeded navigation, and which had been erected upon the Mississippi river within a hundred miles of its mouth, and the court should correctly instruct the jury as to what does and what does not constitute an obstruction to navigation of a navigable stream, but should add that there is no magic in this term "navigable river,"

and that if they should find that this water called the Mississippi river was, at the place indicated, three-fourths of a mile wide, and frequently slopped over its banks at various places, and was in fact composed of only about 95% of water, then they should find that it wasn't a navigable stream, would a decision in favor of the defendant end all question in this court concerning the rights of the United States government over the subject, and deprive it of the power to protect the public rights of navigation?

Now, if the instructions in this case are not, in substance, just as strongly opposed to our understanding of percolating water, then there must be something wrong with all the previous definitions of what constitutes percolating water, and what underground water courses. The Los Angeles river, says the court, is composed of its main stream and *any branches which it may have, whether surface or subterranean.* (Ins. 14, p. 646 of Transcript).

There is no evidence of any subterranean branches except that to which we have already called attention.

"While a water course must have a bed and banks or sides, yet such bed may consist of any material which keeps the waters from penetrating below a certain depth, and such banks or sides may consist of any material which has the effect of confining the water within circumscribed limits."

Instruction 15, p. 646 Trans.

If there is any place in the world where anything that has heretofore been known as percolating water was ever found, that did not have such bed and banks or sides, we know not of the place. But in the 16th instruction they are plainly told that "it does not follow that water which does not flow on the surface in a visible stream is, for that reason, not a watercourse," (which is true) and the court adds, "or not a part of the water of the stream which does at some place run on the surface; nor need it flow in a defined channel under ground as a solid body of moving water of any particular dimensions in order to constitute a water course."

The remainder of this instruction 16 describes just what the evi-

dence had shown in the main near enough for all the purposes of this question. If they find from the evidence,

1. That there is a bed or river bottom;

2. Filled to a considerable depth with sand, gravel or other porous material;

3. Meandering over which a stream runs on the surface;

4. And through (that is the sand and gravel) and in which the water moves undergraund;

5. Enough of it rising to the surface to supply the surface stream;

6. And the other portions of the underground water moving with a much less velocity than the surface stream;

7. And through a wider or larger space in and through the interstices of the porous material;

8. But in the same general direction as the surface stream, and in connection with it;

9. And in a course and with a space *reasonably* well defined;

10. The conditions being such that the existence and general direction of the body of water moving underground can be determined with reasonable accuracy;

11. Then that portion of the river thus moving underground should be considered as a part of the water course as well as that part which flows over the surface.

Trans. pp. 646-647.

There is a bed or river bottom shown in this case. It is filled, to a considerable depth, with sand and gravel, over which the Los Angeles river is meandering with an average width of 45 feet. Through it the water is moving underground. Enough of it does rise to the surface to constitute this Los Angeles river. The other portions are moving underground with a much less velocity than the surface stream. The relative rate of movement being as 2½ feet per second, is to 14 to 17 miles a year. And it is moving through a wider or a larger space, the one being about 45 feet in width, the other 2½ to 3 miles. It comes through the interstices of the porous

material. It does flow in the same general direction as the surface stream, that is to say, it goes between these two mountains and, according to the declivity, inclination or grade, and it couldn't go anywhere else.

And it is in connection with it, as that tterm is subsequently defined in other instructions, that is in contact, and all water that was ever held to be percolating water must have been in contact. If percolating water goes to supply a well, and another well or cut intercepts that percolating water and dries up the well, there must have been a connection between the waters thus cut off and the water supplying the spring or well. In truth, all the water on the earth and in the heavens is in contact.

The general direction of the body of water moving underground can always be determined with reasonable accuracy. When we see mountains with a valley between and have a few elevations which point us to the inclination of the earth's surface, we know the direction in which this water is going. And right here it is submitted, that both in the decision of the Supreme Court and in the instruction, is one of the fundamental errors upon this question. That is not the meaning of having a known and definite channel.

Before citing authorities upon that question, we call attention to the fact that in some cases, perhaps we might say in many, courts have refused to apply the doctrines of water courses which flow upon the surface of the land, to underground water courses which are not known, but wherever they have so refused, it is because it is thought not reasonable to visit upon a man the consequences of getting or drawing the water from an underground water course, the presence of which he knew nothing about until the act was done. But, we submit, that that does not change the question of whether it is a water course or percolating water. In other words, where water is flowing in a solid body in an underground channel, it is not percolating water, whether anybody knows of its existence or not, nor is percolating water a water course though its presence and general direction are known.

In Crescent Mining Co. vs. the Silver King Mining Co., 54 Pac. 244-245, the court said:

"The waters issuing from the artificial channel into the lake are found to be underground percolating waters from the mining claim of the defendant, and not waters naturally flowing in a stream with a well-defined channel, banks and course."

This proposition is established by all the cases cited, and in addition to these, we invite attention to the cases of

Haldeman vs. Bruckhardt, 45 Pa. St., 514; S. C., 84 Am. Dec. 511.

Lybe's Appeal, 106 Pa. St. 634, New Albany and Salem R. R. Co. vs. Peterson, 14 Ind. 112; S. C. 77 Am. Dec. 60.

City of Greencastle vs. Hazelett, 28 Ind. 189; Taylor vs. Fickas, 64 id. 172.

Wheatly vs. Baugh, 64 Am. Dec. 727.

And see the note to Wheatly vs. Baugh, 64 Am. Dec. pp. 729-730, title Subterranean Flowing Streams.

In Haldeman vs. Bruckhardt, 84 Am. Dec. 511, 516, the court, among other things, said:

"We think, therefore, that the learned judge of the common pleas misapprehended what had been ruled in Wheatly vs. Baugh, 25 Pa. St. 528. The defined watercourses there spoken of which a man may not divert to the hurt of an inferior proprietor are not the hidden streams of which the owner of the soil through which they pass can have no knowledge until they have been discovered by excavations made in the exercise of his rights of property.

"There are known streams to which, if the lower proprietor has any rights, they are perceptible, and require no sub-surface exploration before their course can be defined."

84 Am. Dec. 511, 516.

Now, in our case, as we have before stated, the city actually proved that the very existence of these waters was unknown at the date of the issuance of the summons, or if known at all, but imperfectly known, and that fact was put before the jury for the purpose of confining them to the market value at that date. And these things are referred to in the court's instructions and there can be no question about them in the opinions of the Supreme Court. Nor is there

any that about all that was known at the time of the trial had been discovered by these explorations made by both parties for the purposes of the trial. And the case last cited shows that this is not the meaning of the term "known and defined channel" as used in the books.

And in Chasemore vs. Richards, 1st Eng. Rul. Cas. pp. 729, 750-751, Lord Cranworth, in delivering his opinion, said:

"The right to running water has always been properly described as a natural right, just like the right to the air we breathe; they are the gifts of nature, and no one has a right to appropriate them. There is no difficulty in enforcing that right, because the running water is something visible, and no one can interrupt it without knowing whether he does or does not do injury to those who are above or below him. But if the doctrine could be applied to water merely percolating, as it is said, through the soil, and eventually reaching some stream, it would be always a matter that would require the *evidence of scientific men*, to state whether or not there had been interruption, and whether or not there had been injury It is a process of nature not apparent, and therefore such percolating water has not received the protection which water running in a natural channel on the surface has always received."

The fact then made known by these wells and excavations upon the lands of the plaintiffs in error cannot be drawn to the assistance of the court for the purpose of establishing that this is flowing in a known direction, and when it is called in, not only does not prove that it is flowing in a defined channel, but distinctly disproves it. Furthermore, that "the flowing in a known direction" does not answer the description of "flowing in a defined channel" or give to it the character of the water course has been decided by the Supreme Court of California in Gould vs. Eaton, 111 Cal. 639.

The court lays down the doctrine which pertains to percolating waters, and flowing streams, as distinctly as they are stated anywhere. See 111 Cal. 644-645.

And, after referring to the position of the counsel of the plaintiff, that from certain conditions it must follow that the water was, by reason of gravitation, diverted towards the channel of the creek, the court said:

"The mere diversion of its direction does not, however, change its character from percolating water to a flowing stream. So long as it is within the sandstone, although the lower part of the stratum may be more highly charged with the water than the upper, it merely percolates through the sandstone until it is freed at the outcropping of the stratum where it borders upon the stream. It is frequently the case that the *course of percolating waters is in some definite direction*, but the owner of the land in which they are found has the exclusive dominion over them, and does not violate the rights of another by appropriating them to his own use, even though the effect be to divert their course from adjacent lands, or to destroy the advantages therefrom previously enjoyed by an adjacent proprietor."

We invite attention, now, to instructions 17, 18, 19, 20 and 21, transcript, pp. 647-651, and especially to the attempted contrasts, or distinctions drawn by the learned judge of the trial court between the waters which are, and those which are not, percolating within the sense in which they are now employed.

And in these instructions, note this, that it assumes that the jury may find that on the lands sought to be condemned

"There is situated the river bottom of the Los Angeles river extending the whole length of the land, and occupying nearly the whole thereof, and containing all the subterranean waters of said land, and filled to a considerable depth with permeable material," etc., and that as the same lies "In place, the natural voids or interstices of such material generally throughout the whole of said river bottom are equal to from one-fifth to one-third of the entire mass; and that the subterranean waters in said lands enter the same chiefly from the north and partly from the west sides thereof from lands composed of substantially the same materials as the lands sought to be condemned."

"That the south boundary of the river bottom is formed of an impermeable dyke of rock known as the Cahuenga hills;"

And that on reaching there, they are dammed up and forced to fill all of the interstices and void places in the material and so forth, and that the remainder of the said subterranean waters move underground to the east with varying velocity, and much slower than the said surface stream, *but in the same general direction, off the land sought to be condemned*, still continuing in and through the river bottom of the Los Angeles river, composed of the like ma-

terial, and bounded and confined on the south, and rise from time to time as they flow in said river bottom, and feed the said surface flow of the river, and the remainder continues to move underground in said river bottom, and continues to move in that manner for several miles after leaving the land sought to be condemned, and until said river bottom enters into the limits of said City of Los Angeles, then that the jury must find that all the subterranean waters in the land sought to be condemned are a part of the waters of the Los Angeles river.

In what does any part of this description differ from percolating waters unles it is in the word "contact," and the "same general direction"?

But as we have said before, all percolating water is in contact, and in contact with the waters of a well which goes dry when the waters are intercepted. Hence that cannot be the distinction; we have shown that by the decisions of the Supreme Court of California, as well as elsewhere, the fact of moving in the same general direction is not sufficient.

In the 19th instruction there is probably nothing described that isn't percolating water, but then it is very far from completing the description of such waters.

And reading all of these instructions together, it will be seen that the court places its stress upon the words "contact" "confined within definite limits," "flowing in the same general direction," and having these two mountains for banks, and a bed below which it cannot penetrate.

Although in the instructions we occasionally meet with the word "channel," it is always in such a connection that we see that the court is not using it in any other sense than course. Thus in the 20th instruction, on page 650, in folio 1020, he speaks of the water flowing without forming, anywhere in the mass, any *definite course or channel*, and after further language shows that the description there given would not come within the definition of a watercourse, but states as the antithesis,

"But if such waters do collect underground and flow in certain *courses* or *channels* through coarse permeable material therein, where the existence and general course of the flowing or moving body of water can be easily determined, then the water so moving in such channels would constitute a watercourse, although not visible on the surface and although the space through which the channel extends may be largely filled with the material through which the water flows."

It is submitted that mountains separated by a space of 2½ or three miles do not become the banks of an underground watercourse consisting of water which permeates the material throughout the entire width, and in the proportion of one-fifth to one-third of the entire mass.

In Meyer et al. vs. Tacoma Light & Water Co., 35 Pac. 601, the court, after laying down the general doctrine with respect to the rights of the owner of the soil to percolating waters, and after saying that the authorities cited by the plaintiffs, as well as those cited by the defendant, established the doctrine that a flow underground would be protected the same as one upon the surface if it constitutes a stream with a defined course and boundaries, and noticing the application of this doctrine made by the different courts, said:

"Counsel for plaintiffs insist that the proofs were sufficient to authorize a finding that the water in question was so flowing as to be entitled to protection. The proof in regard thereto established this state of facts: That the whole valley or watershed of the stream had underlying impervious stratum; that such stratum was covered by a deposit of gravel of varying depth; that the trend of this impervious stratum from each side of the stream was in general towards the bed thereof. Upon these facts, the plaintiffs contend that this whole watershed should be considered as the bed of the stream, and that, since the water which higher up the stream was flowing upon the surface could not get below this impervious stratum, it must, when under the surface, continue to form a stream within defined limits. There is nothing in the proofs in any manner tending to show that the water was confined to a space immediately below or near the actual bed of the stream upon the surface of the ground; hence the contention of plaintiffs can only be sustained by holding that the entire valley through which it flowed constituted the bed of the stream. No case has been cited that

would justify such a ruling. It has never been held that a flow of water percolating through the sand and gravel of the hillsides which lead down to the bed of the stream will be protected on account of the fact that such waters are confined to the valley to which such hillsides descend, and of which they form a part, by some underlying stratum, below which the waters cannot go. If it had been shown by the proofs that the water all remained upon the surface until it arrived at a defined point, and then all disappeared, the conclusion might follow that it still retained its position as a stream, confined to a point substantially identical with the bed upon the surface. But no such fact was in any manner made to appear. There was nothing to warrant any other conclusion than that the water spread itself through the gravel under and on each side of the stream, with no other boundaries than the underlying stratum of which we have spoken."

id. 601, 602.

In our case there is something more than the mere want of evidence to prove these things. From the time the Los Angeles river appears until it reaches the City of Los Angeles there is, so far as this record shows, a continuous increase in the quantity. It therefore does not disappear at a defined point from which any inference could be drawn that it retained its position as a stream. Furthermore, the Los Angeles river, as many times stated, is made by the rising of a portion of these underground waters, which actual experiment shows is found all over the valley. There is not a mere absence of proof that the water was confined to a space immediately below the surface under the actual bed of the river upon the surface of the ground, but the proof demonstrated that the water at every point was found from one mountain to the other. And the contention of the defendant in error can only be sustained by a ruling which makes the entire valley the bed of this stream. There was not merely nothing to warrant any other conclusion than that the water spread itself on the gravel under and on each side of the stream with no other boundaries than the underlying stratum mentioned in the evidence, but the proof was point blank that it did.

What is there in this case that did not exist in the case of Gould vs. Eaton, 111 Cal. 639, except only that the very factors which

seem to have influenced the determination that this was an underground stream, existed in a more marked degree in Gould vs. Eaton. In that case the statement of facts made by Mr. Justice Harrison, in delivering the opinion of the court, showed that this Cold Spring branch of Montecito creek had its rise in the Santa Inez mountains, and flowed in a southerly direction *through a canyon on the southerly slope of said mountains.* And a description is given of the geological formation, and among other things, it was shown that the stream had a fall of about 400 feet to the mile, and its natural supply was the rainfall upon the adjacent mountains, and descends into the sandstone, percolating through it and passing along the seams and cracks thereof in a direction with the trend of the strata. Moreover, the excavation that was complained of was a tunnel that was constructed at a point about 30 feet west of the stream, and at an elevation about four feet above its level, and was so constructed as to be, throughout the greater part of its length, below the level of the stream.

111 Cal. 641-642.

It was shown, at another place, that a point about three hundred feet from the mouth of the tunnel there was an outcropping of one of the strata of said sandstone, and for a space of about thirty yards along the canyon, extending from near the foot of the western slope of the mountains to the margin of the stream, a distance of about a hundred feet, and that prior to the construction of the tunnel the water percolated through this stratum and moistened the ground and maintained thereon a growth of ferns.

While the width of this canyon is nowhere directly stated, the whole description shows that it was, in comparison with this valley under consideration here, very narrow.

The tunnel in that case began about thirty feet from the stream, and evidently could not have been very far from it anywhere, whereas on this tract of land these underground works could have been so constructed that the tunnels need not have been anywhere within 200 feet of the stream. Certainly with a fall of 400 feet to

the mile, a canyon inclosed by these mountain sides, the percolating waters could not have flowed any other way than in the same general direction with the stream. Furthermore, the difference of the material could not have made the difference between the two cases, for in Gould vs. Eaton it was said:

"The rule" (that is, that the owner of the soil owns the percolating waters) "is not changed by the character of the material through which the water percolates, *whether it be loose sand, or a more compact sandstone.* So long as the water is in a condition of filtration or percolation it is a part of the soil and subject to the sole dominion of the proprietor of the land in which it is found."

111 Cal. 644.

The very complaint shows that these waters are being filtered through this land, and that the very object of constructing these tunnels and laterals is to obtain the filtered water, which is purer by reason of its being filtered, than the waters of the Los Angeles river. (See par. 6 of the complaint, trans. pp. 64-66, fols. 66-68).

And the proof on behalf of the city to justify this condemnation was largely directed to the establishment of the same fact. Thus Mr. Burr Bassell, a witness for the plaintiff. (Trans. p. 100) called for the purpose of showing the necessity of this condemnation, testifies that, among

"The particular reasons for the tract sought to be condemned being made of the length and width that it is, in the first place, this tract extends along the visible stream of the Los Angeles river from the hills on the south to the mesa bluff on the north in general."

Trans. p. 101.

And that the object of taking the water from the underflow instead of from the surface flow, is, in the first place, the natural filtration of the water is better than the surface water, which is more or less contaminated with decaying organic matter, and also from any foreign pollution that may occur on the surface, such as hog pens or sewerage from private dwellings, or anything of that kind.

Trans. p. 102, fol. 128.

Again: It is not possible to tell the exact number of filtration

galleries necessary for the use of the city at this time, because until they are actually constructed, it is impossible to tell exactly how much they will yield."

There is no real distinction between what they call the tunnel and the filtration galleries except that what they designate the main tunnel will be the main artery or conduit to convey the waters; the filtration gallery is merely a subterranean tunnel. There are various forms of construction generally with an open bottom or open sides, to admit the water freely from the sand and gravel formation; sometimes they are pipes with open joints, or perforated pipes. The object is to collect the waters that are flowing underneath the surface, and conduct them in a conduit. They are not in the nature of an artificial filter, but simply a tunnel constructed so as to allow the waters from the outside to flow in. The natural filtration of the water is better than the artificial.

Trans. pp. 102-103.

Evidences might be multiplied to any extent to show that there was no difference in the things about which they were testifying, the witnesses for the plaintiffs in error and those for the defendant in error, and that the sole variance upon this topic is in their different definitions of what constituted a watercourse and what is percolating water. This fact is emphasized by the tenth instruction given by the court to the jury, which is as follows:

"The mere fact that some of the subterranean water forming part of the stream on the lands sought to be condemned may be lost before reaching the point where the same would have gone into and made up part of the surface or subterranean stream of the Los Angeles river, would not give the defendants the right to divert an amount of said subterranean waters in said land equal to or less than the amount so lost, if such diversion would have the effect of diminishing the waters surface or subterranean of the said river at any point above the south line of the pueblo lands of the City of Los Angeles."

Trans. p. 285.

This tenth instruction emphasizes two things:

First. That it was the court's view that if of this subterranean water thus moving through this material, some of it were lost

and never did reach the Los Angeles river anywhere, still the plaintiffs in error would not be entitled to compensation for an amount equal to that which would be thus lost, provided that in diverting it the effect would be to diminish the waters, surface or subterranean, of the said river *at any point above the south line of the pueblo lands of the city of Los Angeles.* It is submitted that this language shows that we are not mistaken in the understanding which the jury must naturally have reached. It was not the idea of the court nor witnesses of the defendant in error that the waters taken from this subterranean supply would have any effect upon the Los Angeles river at the point where it was taken, or upon these lands, but if permitted to flow down, it would enter the Los Angelse river on the surface somewhere before the river reached the south boundary of the city, or at least that is where the greater part of it would go. And this again suggests the influence which the statutes of the State of California had upon the trial of this case, for it will be remembered that the pretended grant there is of all the waters of the river from its source to the south boundary of the city, and here the court adopts the view that the abstraction of any subterranean water that would prevent its flowing into the Los Angeles river at some place between the point of diversion and the south boundary of the city was in contravention of the city's rights in the water.

We respectfully submit that in this case the jury were told that the plaintiffs in error owned the percolating water by name, and that they didn't own it when the same thing was presented to them by description. Over a very considerable portion of this tract of land which was here denominated the Los Angeles river, there was a heavy growth of timber, partly on the mountain side and partly on the mesa or second bottom land. Those on the mesa were from a foot and a half to five feet in diameter. The largest are mainly oak, but a large number of willows running from small saplings to 2½ feet in diameter.

Trans. p. 409.

These trees belonged to the owner of the soil as much as the earth in which they grew, and could not be taken away from the plaintiffs in error without just compensation. This nobody would dispute; but could it have been accomplished by the court's telling the jury in one instruction that the trees belonged to the plaintiffs in error, and that they should be compensated for them, and in another that there was no magic in the word tree, and that any growth less than six feet in diameter wasn't a tree, and did not belong to the owners of the soil? By the common law as it was understood in England, and as it is understood in every State in the United States, including California prior to the decision in this case, a grant of land carried with it as part and parcel of it, the percolating waters as much as it did the trees, and the patent from the United States government under which the plaintiffs in error claim, passed those waters as incident to, or part of, the thing granted. Such is the legal effect of a United States patent, and that effect could not be controlled by State laws, for if it can, it is in the power of any State to deprive the public lands belonging to the United States of all their value by judicial interpretations and limitations upon the effect of the grant when it is made.

And finally, before concluding this argument, which has already spun out to a length so enormous that we have not the courage to even apologize for it, we again call attention to the fact that long prior to the issuance of any of these patents or the presentation of any of these petitions, the legislature of the State of California had declared that the common law was the rule of decision in this State where there was no statute to the contrary. The statute passed April 13, 1850, entitled An Act adopting the Common Law, is as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution of the United States or the constitution or laws of the State of California, shall be the rule of decisions of the courts of this State."

Stats. 1850, p. 219.

And this has continued to be the law of this State ever since. It was carried into the codes of this State enacted in 1872, and which went into effect in the main on the 1st of January, 1873.

Section 4468 of the Political Code declares that the common law of England, so far as it is not repugnant to, or inconsistent with, the constitution of the United States, or the constitution or laws of this State, is the rule of decision in all the courts of this State.

This court is in no manner bound by the decisions of the State courts as to what the rule of the common law is, in any case.

Chicago v. Robbins, 2 Black 418; 17 L. Ed. 298, 304.

At the page last cited this court said:

"Where rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the State court.

"But where private rights are to be determined by the application of common law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."

And this is approved in Michigan Cent. R. R. Co. vs. Mark, 107 U. S. 102; 27 L. Ed. 325, 327.

If therefore there ever was any power in the State of California to declare the effect of a United States patent, these statutes adopting the common law as the rule of decision, was the exercise of that State power. If, before, there were no law to which we could look to ascertain what passed by a patent of the United States (which we deny), then a patent by the United States granting lands in California would have the effect that would follow a grant under the common law. And the title once having accrued under that grant, it could not be divested by any act of the State. But aside from that, long prior to the existence of the State of California, there had been grants of land by some of the States to the United States. What title passed under these grants, and what property was governed by them, and what were the incidents to the things granted? There was no law to which we could have looked for the effect of such grants save only the common law. Grants of land have been repeatedly made by the United States to

private individuals and corporations, private and quasi public, in many of the territories of the United States long prior to their admission into the Union. Did not all such grants carry with them all the rights of property and incidents and appurtenances that were understood to pass by those laws which were recognized as the sources to which we were to look for the measure of our rights where our own laws are silent? Such rights as are vested in the United States in the lands owned by it pass by its patent unless excepted from the grant. And such rights were owned by these plaintiffs in error in the lands condemned, and it is respectfully submitted that the proceedings in this cause have resulted in taking the property of the plaintiffs in error without just compensation, and therefore they have been deprived of their property without due process of law, in violation of the Constitution of the United States, and the judgment should be reversed.

J. S. CHAPMAN,
Attorney for Plaintiff.

JOHN GARBER,
R. H. F. VARIEL,
J. G. NORTH,
Of Counsel.